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Cultural Resistance to Global Governance

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CULTURAL RESISTANCE TO GLOBAL GOVERNANCE

*Joel Richard Paul**

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I. INTRODUCTION

We often frame the debate over global governance as a conflict between some set of international legal norms, like free trade or human rights, and something we posit as national "culture."¹ State actors and legal scholars assert cultural claims as a strategy for resisting global governance. For example, European states seek exemption from international trade agreements prohibiting barriers to the importation of U.S. films, music and television, which they believe threaten European culture.² Japan, Norway, and some indigenous North American tribal nations claim a cultural right to whale that supersedes the international moratorium on whale hunting.³ Some theocratic and developing states, like Iran, Bangladesh, China, Argentina, Kenya, and Zimbabwe, claim cultural exceptions to engage in practices that otherwise contravene the international human rights of women and sexual minorities.⁴ In general, the international community⁵ does not regard practices that implicate commercial trade or environmental resources as cultural. By contrast, the international community acknowledges that gender norms and roles

1. I am using the term "global governance" here to refer to the whole constellation of international norms and relationships that affect public and private actors. Global governance is distinguishable from supranational government, and it has developed in tandem with globalization. See generally David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 551, 563-575, (1997)(describing how public international law manages the conflict between national culture and global governance).

2. See, e.g., John David Donaldson, *Television without Frontiers: The Continuing Tension Between Liberal Free Trade and European Cultural Integrity*, 20 FORDHAM INT'L L. J. 90 (1996) (discussing European Union concerns with imported television programming).

3. See, e.g., M. R. Freeman, *Social and Cultural Significance of Whaling in Contemporary Japan: A Case Study of Small-Type Coastal Whaling*, in KEY ISSUES IN HUNTER-GATHERER RESEARCH (Ernest S. Burch, Jr. and Linda J. Ellanna, eds. 1994); Martha Howton, *International Regulation of Commercial Whaling: The Consequences of Norway's Decision to Hunt the Minke Whale*, 18 HASTINGS INT'L & COMP. L. REV. 175 (1994); Kazu Sumi, *The "Whale War" Between Japan and the United States: Problems and Prospects*, 17 DEN. J. INT'L L. & POL'Y 317 (1989).

4. See generally HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca Cook, ed., 1994); THE INTERNATIONAL HUMAN RIGHTS OF WOMEN: INSTRUMENTS OF CHANGE 11-72 (Carol Elizabeth Lockwood, Daniel Barstow Macgraw, Margaret Faith Spring & S. I. Strong, eds., 1998) (describing the resistance of developing and theocratic states to the progressive development of women's rights through the United Nations); WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES (Julie Peters & Andrea Wolper, eds., 1995); Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307 (1994) (discussing how certain interpretations of Islamic law regarding women's rights displace international law).

5. I use this term to reference both state actors and international legal scholars who contribute to the creation and understanding of international legal norms.

are intrinsic to national culture and accords them great deference.⁶ How and why do we posit some social behavior as authentically “cultural,” and when does “culture” trump international legal norms? This article explores how state actors⁷ and legal scholars make cultural claims in different legal contexts and suggests a linkage between the deployment of cultural exceptions and the project of globalization⁸.

Human rights scholars are familiar with the problem of cultural resistance to global governance.⁹ Yet other areas of international legal scholarship largely disregard the question of cultural relativism precisely because scholars do not acknowledge these contested practices as cultural. Most international trade law scholars, for example, dismiss cultural resistance as transparent protectionism.¹⁰ Some scholars in

6. Throughout this article I will refer interchangeably to “gender equality norms” or “the rights of women and sexual minorities.” I use the term “sexual minorities” to include all lesbian, gay, bisexual, and transgendered persons. There is obviously a close connection between gender and sexual roles or sexuality. Some argue that discrimination against sexual minorities is based upon, and perpetuates, stereotypes of men and women. *See generally* Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1998 WIS. L. REV. 187 (1998). The most egregious examples of gender discrimination often occur in countries with extreme forms of discrimination against sexual minorities, such as Iran. Moreover, as discussed more fully below, countries opposing international rights for women often allege that gender equality promotes homosexuality. *See* Felice D. Gaer, *And Never the Twain Shall Meet? The Struggle to Establish Women’s Rights as International Human Rights*, in *THE INTERNATIONAL HUMAN RIGHTS OF WOMEN: INSTRUMENTS OF CHANGE* 46 (Carol Elizabeth Lockwood et. al eds., 1998).

7. I realize, of course, that non-state actors, especially nations within states, also invoke cultural exceptions. I compare below one example of a cultural exception invoked by an indigenous tribal nation with a comparable cultural exception invoked by states.

8. Globalization refers to both the worldwide process of liberalizing state controls on the international movement of goods, services and capital and the social, economic and political consequences of liberalization. *See generally* SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* (1999).

9. *See, e.g.*, Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211 (1999) (rejecting the charge that international human rights represent cultural imperialism); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984) (defending the universality of certain rights); Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT’L. L. & POL. 291 (2000) (arguing for the importance of cultural narratives in human rights discourse); Makau-wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L. L. 589 (1996) (criticizing human rights discourse as imposing western ideology on the Third World); Di-anne Otto, *Rethinking the “Universality” of Human Rights Law*, 29 COL. HUM. RTS. L. REV. 1 (1997) (rejecting the universality of rights in favor of a transformative “consciousness of the multiplicities and incommensurabilities”); Fernando R. Teson, *International Human Rights and Cultural Relativism*, 25 VA. J. INT’L. L. 869 (1985) (international human rights must be universal, but international law requires respect for national cultures).

10. It is significant, for example, that treaties on GATT law do not give serious consideration to the cultural exception argument. *See, e.g.*, ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1990); JOHN JACKSON, *THE WORLD TRADING SYSTEM* 206–208 (1989); MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* (1995).

environmental law might weigh the cultural claims of indigenous nations against environmental norms, but generally, they regard cultural claims by states with suspicion.

Cultural resistance to global governance is the product of the twin concepts of culture and sovereignty. Our traditional conception of sovereignty assumes in part that the nation-state is identified with a particular national culture.¹¹ The state acts within a cultural context that legitimates the exercise of state power. Internally, culture creates a bond of nationality between the individual and the state, and nationality along with territory defines the reach of sovereign jurisdiction. Externally, culture justifies the use of force to project and protect national values.¹² The conventional view of state power assumes that culture is pre-political, in the sense that culture precedes and constitutes the state, and the state exists to protect national culture from foreign influence.

State actors and legal scholars invoke the term "culture" as an exception to an international legal norm without acknowledging that the term itself is contested.¹³ Claims about culture reference a complex relationship between sovereignty, civilization and colonialism. Cultural anthropologists have long recognized the difficulty of defining "culture." Our modern understanding of culture reflects the instability of the concept.¹⁴ We imagine culture as something that is offered to the

11. The French political theorist Bodin introduced the idea of the sovereign as the supreme power within the state territory in his work, *De la République*, in 1577. In *De Cive*, Hobbes asserted further that the sovereign was supreme even over the church. Sovereignty has been the basis for international law at least since the treaties known as the Peace of Westphalia of 1648, which ended the Thirty Years War. See *Treaties of Peace Between Sweden, France and the Holy Roman Empire* (October 14, 1648), I.C.T.S. 119-356; Leo Gross, *The Peace of Westphalia 1648-1948*, 42 AM. J. INT'L. L. 20 (1948). By rejecting the religious authority of the Holy Roman Emperor, the peace treaties established that each state was sovereign within its own territory and free to choose its own religion. In this way, sovereignty was equated with a particular language and religious tradition. The Peace of Westphalia guaranteed that culturally distinctive states would possess sovereignty equality. See generally Alfred-Maurice de Zayas, *Peace of Westphalia (1648)*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 536-39 (1984).

12. For example, China justifies its invasion and occupation of Tibet by arguing that it is bringing modernity and culture to a backward society. Similarly, the British justified their colonization of India by reference to the religious and cultural values they introduced to a heathen country.

13. See *id.* at 31-33. Originally, "culture" referred to cultivation of crops or animals. See RAYMOND WILLIAMS, *KEYWORDS* 77 (1976). By the eighteenth century, German philosophers used the term, "*kultur*" to refer to the process of educating or civilizing an individual, and eventually, the term culture became a synonym for "civilization." See ADAM KUPER, *CULTURE: THE ANTHROPOLOGISTS' ACCOUNT* 30-32 (1999).

14. Clyde Kluckhohn categorized 164 definitions of culture. See *id.* at 56. These included: "the total way of life of a people"; "the social legacy the individual acquires from his group"; "a way of thinking, feeling, and believing"; "an abstraction from behavior"; "an anthropological theory about group behavior"; "a storehouse of pooled learning"; "a set of

masses as a kind of spiritual uplift. At the same time, the ethic of cultural relativism teaches us that high culture, folk culture, and popular culture are all "equal." Our contemporary stance of cultural pluralism or multi-culturalism is inherently ambivalent. Tolerance counsels us to regard cultural differences as unimportant; we strive to find common ground among cultures. Yet, the politics of cultural identity celebrates cultural differences and seeks to preserve them. At the same time that anthropologists reject essentializing cultural differences, the politics of cultural identity seem to embrace essentialism.¹⁵ I will not attempt to define culture, but rather, I am interested in exploring why we accept some practices as authentically "cultural" and not others. I use the term "culture" here only in the same way that state actors and legal scholars invoke the term to resist international legal norms.

Historical forces shaped culture's shifting, indeterminate meaning. The idea of culture originated as a justification for colonialism. In exchange for territory and wealth, the Europeans offered culture to the uncivilized mass of humanity.¹⁶ In the nineteenth century, culture represented the rational linear historical evolution toward becoming a modern European state.¹⁷ In this sense, culture embodied European

standardized orientations to recurrent problems"; "learned behavior"; "a mechanism for the normative regulation of behavior"; and "a precipitate of history." CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 4-5 (1973) (quoting CLYDE KLUCKHOHN, *MIRROR FOR MAN* (1965)). Kluckhohn concluded that "Culture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols." KUPER, *supra* note 13, at 58 (quoting A.L. Kroeber and Clyde Klockhohn, *Culture: A Critical Review of Concepts and Definitions*, in 47 *PAPERS OF THE PEABODY MUSEUM, HARVARD UNIVERSITY* 1, 15 (1952)). Similarly, Geertz defined culture as "historically transmitted pattern of meanings embodied in symbols." GEERTZ, *supra* note 14, at 89. James Clifford acknowledged that culture is an unstable concept, and that culture, identity and ethnography are so intertwined that an observer cannot escape the trap of subjectivity. Clifford described the historicized idea of culture as a social construct. See generally JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* (1988).

15. See KUPER, *supra* note 13, at 238-242. See generally DAN DANIELSON AND KAREN ENGLE, *IDENTITY POLITICS* (1994); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585 (1990) (rejecting the idea of gender essentialism, namely, "the notion that unitary 'essential' women's experience can be isolated and described independently of race, class, sexual orientation and other realities of experience.").

16. In Chief Justice John Marshall's words, "The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence." *Johnson v. McIntosh*, 21 U.S. 543, 573 (1823).

17. See KUPER, *supra* note 13, at 5-10; 1 EDWARD B. TYLOR, *PRIMITIVE CULTURE: RESEARCHES INTO THE DEVELOPMENT OF MYTHOLOGY, PHILOSOPHY, RELIGION, LANGUAGE, ART AND CUSTOM* 1-2 (1870). Nineteenth-century Europeans assumed that humankind naturally evolved from the primitive to the civilized according to universal natural laws that could be studied and generalized from one nation to another. See, e.g., id. at 3-6, 9-23 (1870); Williams, *supra* note 13, at 90 (citing G. F. KLEMM, *ALLGEMEINE KULTURGESCHICHTE DER MENSCHHEIT* (General Cultural History of Mankind) (1843-52)). Cf. JARED DIAMOND, *GUNS, GERMS, AND STEEL* (1997) (showing how culture is a product of

attitudes of racial superiority.¹⁸ As culture set Europeans apart from other nationalities,¹⁹ it defined nations and states.²⁰

By the end of the nineteenth century a new conception of culture emerged. Just as the idea of culture defined nationhood, the idea of culture itself divided along national lines.²¹ Late nineteenth-century British social critics of industrialization contrasted the soulless mechanical quality of urban society with the humanity and spirituality of primitive

different geography, biology and history); DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS* (1998) (explaining how economic progress results from the complex interplay of culture and unique geographical and historical circumstances).

18. Critics of colonialism attacked this use of the term culture as an arrogant pretense. The German philosopher Herder wrote of culture that "nothing is more indeterminate than this word, and nothing more deceptive than its application to all nations and periods." WILLIAMS, *supra* note 13, at 79 (citing JOHANN GOTTFRIED VON HERDER, *IDEAS ON THE PHILOSOPHY OF THE HISTORY OF MANKIND* (1784-91)). European imperialism regarded colonial people as nothing more than ashes "to manure the earth," so that "at the end of time [their] posterity should be made happy by European culture." *Id.* He described the European claim of cultural superiority as "a blatant insult to the majesty of Nature." *Id.* Herder, like others in the Romantic Movement, idealized local culture as opposed to the elitist view of European civilization. *See id.* Culture, in this sense, was an antidote to the formal, unnatural class-oriented structure of European society.

19. *See* ROBERT J. C. YOUNG, *COLONIAL DESIRE: HYBRIDITY IN THEORY, CULTURE, AND RACE* 4-32 (1995).

20. *See* Rosemary J. Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, in *LAW IN THE DOMAINS OF CULTURE* 21, 25 (Austin Sarat and Thomas R. Kearns eds., 1998).

21. Conflicting ideas of culture grew out of national differences among European and American social scientists. *See* KUPER, *supra* note 13, at 29-46. For example, the French idea of culture was born out of the Revolution and the Enlightenment. For the French, the process of becoming cultured was a rational, universal and progressive evolution. *See id.* at 30-31. Culture would flow inexorably from France to the world and transform every aspect of social, political and spiritual life. *See id.*

By contrast, early twentieth-century German intellectuals viewed culture as the process of becoming educated. *See id.* at 31. Culture imposed order, discipline and spiritual values. Without culture, society descended into barbarism. French culture was rational, material and cosmopolitan as against the spiritualism and romanticism of the German *volk*. German national idealism clashed with French cosmopolitanism. *See id.* at 31-34. German intellectuals described this contrast between the French and Germans in terms that sound remarkably like the present debate over preserving national culture from the rationalizing material forces of globalization.

British intellectuals feared that either the soulless oppressive influence of industrialization or the crass materialism of mass consumerism would debase high culture. *See id.* at 36 (citing MATTHEW ARNOLD, *CULTURE AND ANARCHY* (1869)).

The American conception of culture developed as more inclusive and democratic than any of the Europeans'. *See id.* at 56. "Culture, or Civilization, taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society." *Id.* (quoting E. B. TYLOR, *PRIMITIVE CULTURE* 1 (1871)). Anthropologists in the United States integrated the disparate European traditions and redefined anthropology as a science of the symbolic dimension of culture. *See id.* at 53 (citing TALCOTT PARSONS, *THE STRUCTURE OF SOCIAL ACTION* (1937); TALCOTT PARSONS, *THE SOCIAL SYSTEM* (1951)).

culture, which they romanticized as morally superior.²² Anthropologists drew attention to the culture of colonized nations. By identifying certain prevalent practices among some dominant groups as “cultural,” anthropologists privileged one idea of culture over others and mapped a European concept of nationality onto Africa and Asia. By acknowledging all cultures as morally equivalent, twentieth-century anthropology challenged the legitimacy of European imperialism. At the same moment that European powers wielded culture as a sword to project their political and economic hegemony, some social scientists deployed culture as a critique of European imperialism. Since the mid-twentieth century, newly independent states of the Third World have invoked national culture as a shield against European and American hegemony. Ironically, these former colonies have appropriated the concept of “culture” from their colonizers.²³

Despite the instability of the concept of culture, state actors and legal scholars deploy cultural claims as a strategy for resisting global governance. Trade is one of the principal sources of this cultural resistance. Cultural-importing states often try to restrict cultural imports, which they regard as threatening their cultural autonomy. In response, cultural-exporting states generally dismiss claims of cultural autonomy as either a restraint on the free flow of information or a form of economic protectionism.²⁴ This international debate, of course, reflects internal debates within these foreign countries over the meaning of western democracy and market liberalization. Democracy and market liberalization have contributed to a backlash against western ideology and culture in the form of religious fundamentalism and extreme nationalism.

Cultural resistance to global governance is a displaced response to the anxiety produced by globalization. It exists within western countries as well. The rise of the Christian Right and the proliferation of extreme militia groups in the United States are arguably a response to economic displacement and the sense that the country can no longer control its

22. See KUPER, *supra* note 13, at 40–46. These critiques of industrialization shaped the idea of culture among British intellectuals. See RAYMOND WILLIAMS, *CULTURE AND SOCIETY* i-xi, 90, 117 (1983).

23. Today, U.S. anthropologists view culture as a way of referencing differences, rather than as a meaningful sociological category. See WILLIAMS, *supra* note 22, at 211–12. The discourse of culture has become a means to empower a particular community to resist the forces of globalization.

24. See *Debate Over EC's Attempt to Exclude Audiovisual Sector from GATS Continues*, 10 INT'L TRADE REP. (BNA) 1628 (Sept. 29, 1993). Richard Self, the U.S. Chief Negotiator for GATS, commented that “what is truly frightening to the U.S. is the idea of a cultural exception. To make culture untouchable is to enable people to protect anything because no one has a universal definition of culture.” *Id.*

destiny independent of the world economy.²⁵ The growing popularity of extreme nationalist groups in France, Austria, Germany, and the former Soviet Union countries all signal the same reaction against globalization. What Justice Scalia has characterized as the “Kulturkampf”²⁶ is an international phenomenon rooted in anxieties over globalization.

This article maps out the terrain in which state actors and legal scholars make claims premised on a cultural exception to justify derogating from international legal norms. My aim is to understand why some of these claimed cultural practices displace international legal norms, while other practices are dismissed as violating international legal norms. Part II will examine this discourse in relation to the rights of women and sexual minorities. I will show that the international community generally regards gender norms as cultural and the international legal norm of gender equality usually defers to national cultural practices. Part III discusses the discourse of cultural exceptions in the context of international trade. I will argue that when states assert a right to protect themselves from cultural imports, like publications, film, sound recordings, and television programs, the international community generally rejects these claims as a pretext for economic protectionism. Part IV considers cultural exceptions to international environmental norms. Some states argue that they have the right to trade in the products of endangered species based upon traditional cultural practices. The international community refuses to recognize these practices as “cultural” and insists on compliance with the international legal norm. However, as I will argue, the international community does accept these practices as “cultural” among some indigenous nations and has granted a *de minimis* cultural exception to environmental norms for these indigenous nations. Finally, Part V attempts to reconcile the apparently inconsistent treatment of cultural claims. I conclude that cultural claims are accepted only to the extent that they facilitate globalization by displacing popular anxiety caused by market liberalization.

25. For example, a recent Pew Research Center poll found that 52% of Americans fear globalization. Among persons earning less than \$50,000, only 37% believe that globalization would help them. See Andrew Kohut, *Globalization and the Wage Gap*, N.Y. TIMES, Dec. 3, 1999, at A31. See generally JOHN GRAY, *FALSE DAWN* (2000); WILLIAM GREIDER, *ONE WORLD, READY OR NOT* (1997).

26. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia in dissent, defending a Colorado State constitutional amendment barring the state and localities from passing ordinances to prohibit discrimination on the basis of sexual orientation.) The word “Kulturkampf” or culture war refers to the effort by Bismarck to purge Catholic influences from German society. Here Justice Scalia’s use of the term may have revealed more than he intended.

II. CULTURAL EXCEPTIONS TO GENDER EQUALITY

A. *The Norm of Gender Equality*

State actors and legal scholars generally regard most of the rights set forth in the Universal Declaration of Human Rights and the U.N. Covenants on Human Rights as universal.²⁷ All states regardless of cultural differences accept the international prohibitions against slavery,²⁸ torture,²⁹ or the wanton taking of innocent human lives.³⁰ Although some critics would argue that the idea of “rights,” reflects western liberal individualist ideology that is not necessarily shared by all societies, the basic principles enshrined by these U.N. instruments are universal.³¹

Among these principles is the norm of gender equality.³² Most states agree that men and women should enjoy formal equality under the law. Yet, states often regard substantive equality (by which I mean rights like reproductive freedom, equal employment and educational opportunities, and equal authority and property rights within the family) as less universal.³³ For our purposes, I will refer to this cluster of formal and substantive equality rights as the “international norm of gender

27. See Universal Declaration of Human Rights, art. 2, G.A. Res. 217, U.N. GAOR, 3d Sess., Supp. No. 51, U.N. Doc. A/810 (1948); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 3, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

28. See International Covenant on Civil and Political Rights, *supra* note 27, Convention Outlawing Slavery.

29. See Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 2, 23 I.L.M. 1027, *modified*, 24 I.L.M. 535.

30. See International Covenant on Civil and Political Rights, *supra* note 27, at art. 6; Universal Declaration of Human Rights, *supra* note 27, at art. 3.

31. See LOUIS HENKIN, *THE AGE OF RIGHTS* 181–93 (1990).

32. The Universal Declaration of Human Rights provides that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth or other status.” (emphasis added) Universal Declaration of Human Rights, *supra* note 27, at art. 2. The U.N. Charter presumed that men and women should be equal. It stated that one of the four purposes of the Organization is to promote “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . .” U.N. CHARTER art. 1, para. 3. The norm of gender equality is also contained in article 2(1) of the International Covenant on Civil and Political Rights, *supra* note 27; Art. 3 of the International Covenant on Economic, Social and Cultural Rights, *supra* note 27; and Art. 2 of the Convention on the Elimination of all Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, art. 2, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 13, 19 I.L.M. 33 [hereinafter CEDAW].

33. See Donnelly, *supra* note 9, at 400 (human rights are universal, but certain traditional practices involving women and the family, such as marriage, cannot be subject to universal rules); JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 34–38 (1993) (human rights are universal, except when they conflict with certain traditional practices such as the wearing of the veil in Islamic countries).

equality.”³⁴ Gender equality implicates the rights of men, sexual minorities, family, and children, as well as women.³⁵

The international community generally accepts the idea that the norm of gender equality implicates culture.³⁶ For example, many states have conditioned their acceptance of the Convention on the Elimination of Discrimination Against Women (CEDAW)³⁷ upon cultural circumstances. Some Islamic and Third World states invoke cultural circumstances as a justification for limiting a woman’s right to marry, divorce, control her reproduction, exercise custody over her children, retain property, obtain an education, pursue certain professions, work outside the home, or form an intimate relationship or household with another woman.³⁸ Some states also invoke their culture to defend discrimination against, and persecution of, sexual minorities, including loss of family rights, denial of employment opportunities, physical abuse, imprisonment and even capital punishment.³⁹ There is also a broad debate among scholars whether the norm of gender equality is universal or culturally relative.⁴⁰ The rights of women and sexual minorities⁴¹ are

34. State parties to the International Covenants and CEDAW sometimes use reservations to carve out exceptions from the norm of gender equality. Arguably, there is no consensus for gender equality except in the sense of formal equality. The interesting question here is why states use culture to justify their reservations to gender equality.

35. The rights of children are also closely related to gender, since they depend in part on the rights of both parents to act on behalf of the child. Young girls, in particular, are often subject to discrimination and violence as a consequence of both their age and gender, and the exploitation of children in production, pornography and prostitution is also related to the exploitation of women in the same circumstances. CEDAW explicitly recognizes this connection by protecting the rights of children. Article 16, paragraphs (1)(d) and (f) provide that the interests of children relating to family relationships are paramount; Article 16, paragraph (2) prohibits child marriage.

36. I use the term culture here to include religion. The difficulty of defining the term is discussed above.

37. See CEDAW, *supra* note 32.

38. See generally Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari’a and the Convention Compatible?*, 44 AM. U. L. REV. 1949 (1995); Mayer, *supra* note 4, at 323–24.

39. See, e.g., ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* 3–9, 89–104 (1995).

40. See, e.g., A. RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* (1990); Douglas Lee Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 STAN. J. INT’L L. 345 (1991); Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism, and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49 (1993); Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. WOMEN’S L.J. 189 (1993); Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT’L L. & POL. 795 (1992).

41. The international community is most likely to defer to culture when men or women challenge traditional gender roles by asserting non-traditional sexuality. Restrictions on

especially vulnerable to the authority of culture. I will focus my discussion on the effect that cultural exceptions have on these groups.

The idea that gender equality is subject to, or bounded by, culture reflects the traditional divide between the public and private realms in international law.⁴² This divide also exists in domestic law.⁴³ Traditionally, most societies confine women's roles to the domestic sphere of home, marriage, and family; women are not readily accepted in the public sphere of government, politics and commerce.⁴⁴ Within the domestic sphere, private power determines status relations between men

homosexuality, whether imposed by the state or social discrimination tolerated by the state, buttress traditional categories of masculine and feminine traits and preserve expectations of how men and women behave in private life. See Law, *supra* note 6, at 209–11 (“The assumption and prescription of heterosexuality is one important piece in the mosaic that gives meaning to sexuality and to cultural concepts of gender.”). Discrimination against sexual minorities should be regarded as gender discrimination. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex”, “Gender”, and “Sexual Orientation” in Euro-American Law & Society*, 83 CAL. L. REV. 3, 117–28 (1995) (concluding that it is not meaningful to distinguish discrimination on the basis of sex, gender or sexual orientation). The U.N. Human Rights Committee in *Toonen v. Australia* suggested that for purposes of the prohibition against sex discrimination in article 2, paragraph 1 of the Covenant on Civil and Political Rights, the term “sex” included sexual orientation. See U.N. Hum. Rts. Comm., No. 488, U.N. Doc. No. CCPR/c/50/D/488/1992 (1994). See generally ROBERT WINTERMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS 144–49 (1995); Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights*, 9 HARV. HUM. RTS. J. 61, 65–67, 74–77 (1996) (discrimination on the basis of sexual orientation is gender discrimination); James D. Wilets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 COLUM. HUM. RTS. L. REV. 33, 36–39 (1995) (international law prohibits discrimination on the basis of sexual orientation).

42. See STUDIES IN TRANSNATIONAL LEGAL POLICY No. 25 (ASIL); Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law*, 12 AUSTL. Y.B. INT'L L. 190 (1992); Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Frances E. Olsen, *International Law: Feminist Critiques of the Public/Private Distinction*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 157–89 (Dorinda G. Dallmeyer ed., 1993); Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 86–110 (Rebecca J. Cook ed., 1994); Shelley Wright, *Economic Rights, Social Justice and the State: A Feminist Reappraisal*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 117–36 (Dorinda G. Dallmeyer ed., 1993). For a broader discussion of the public/private distinction in international law, see Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L. L.J. 149, 155–164 (1988).

43. See Duncan Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Morton Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

44. See generally JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (1999); NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM (1987); Reva Siegel, *The Rule of Love: Wife Beating as Prerogative*, 105 YALE L.J. 2117 (1996); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 MICH. J.L. REF. 835 (1985).

and women, husbands and wives, and fathers and mothers. The state rarely exercises public power over these private relations. The state limits its roles primarily to the division of property rights and the custody of children.

Most societies generally regard women as "the repositories, guardians, and transmitters of culture."⁴⁵ When women assert their autonomy, they may be seen as threatening the reproduction of culture and thus society's survival.⁴⁶ Third World societies, in particular, often measure western cultural influence in terms of its effect on women.⁴⁷ In these societies, modernization has often been accepted in almost every respect except with regard to traditional gender roles.⁴⁸ As globalization causes economic and social dislocation in both the industrialized and developing countries, societies sense profound cultural changes, and there is a concomitant pressure to defend culture by preserving traditional gender roles.⁴⁹

One of the striking characteristics of the debate over the universalism of women's rights has been the willingness of even human rights advocates and feminist legal scholars to concede that gender norms implicate culture and may be subject to a cultural exception.⁵⁰ Scholars have been concerned particularly with cultural exceptions to the rights

45. Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 167, 169 (Julie Peters & Andrea Wolper eds., 1995).

46. *See id.* at 169-172. *See also* Romany, *supra* note 42, at 85-96.

47. For example, modernization in Arab Societies has sparked a deep social struggle over gender roles. The elite class generally favors expanding educational and career opportunities for women, but at the same time, post-colonial Arab nationalists resist westernizing women. Nationalist elites expect women to modernize and respect traditional Arab patriarchy. *See* Lama Abu-Odeh, *Crimes of Honour and the Construction of Gender in Arab Societies*, in FEMINISM AND ISLAM: LITERARY AND LEGAL PERSPECTIVES (Mai Yamani, ed. 1996).

48. Men in postcolonial societies often adapt rapidly to modern western cultural forms, while women may be expected to remain faithful to more traditional cultural norms. *See* UMA NARAYAN, *DISLOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD-WORLD FEMINISM* 17-27 (1997) (discussing *inter alia* how Indian men readily westernize clothing, while Indian women still maintain traditional dress).

49. *Id.* The pattern of defending traditional gender roles may be characteristic of periods of modernization. For example, Nancy Cott has shown how during the early period of industrialization (1780-1830) in New England profound social transformations created an expectation of "domesticity" that reaffirmed the traditional place of women in the home. "Thus women's self-renunciation was called upon to remedy men's self-alienation." NANCY F. COTT, *THE BONDS OF WOMANHOOD: WOMEN'S SPHERE IN NEW ENGLAND, 1780-1835* 63-100 (1977).

50. For a good overview of the debate over cultural relativism and women's rights, see HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca J. Cook ed., 1994); and OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS (Joanna Kerr ed., 1993).

of women in Third World countries.⁵¹ Human rights scholars routinely single out the CEDAW as requiring “invasive state action” that endangers individual rights, cultural attitudes, and religious beliefs.⁵² Most scholars accept that culture contextualizes the norm of gender equality, which, unlike other human rights norms, expands or contracts as a function of culture.⁵³ One human rights scholar concedes:

Many conflicts between women’s human rights and religious freedom involve norms that have not as yet been accorded overriding significance by the international community In such situations of conflict, a balancing approach that takes into account particularized facts concerning the impact of the rights involved on one another, and on the underlying principles of gender equality and religious freedom, can provide a framework for conflict resolution.⁵⁴

Human rights advocates accept the argument that gender discrimination is a private domestic matter beyond the reach of international human rights law.⁵⁵ Even among human rights advocates who reject the

51. See, e.g., Engle, *supra* note 9 (arguing for culturally sensitive universal rights); Michael C. Davis, *Constitutionalism and Political Culture*, 11 HARV. HUM. RTS. J. 109 (1998) (criticizing cultural relativism as deterministic and tautological); Simon S.C. Tay, *Human Rights, Culture and the Singapore Example*, 41 MCGILL L. J. 743 (1996) (examining the problematic character of the cultural argument in the context of Asian human rights); Abdullahi Ahmed An-Na’im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167–88 (Rebecca J. Cook ed., 1994) (states have a responsibility to remove cultural and religious barriers to women’s rights); Adetoun O. Ilumoka, *African Women’s Economic, Social, and Cultural Rights—Towards A Relevant Theory and Practice*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 308–25 (Rebecca J. Cook ed., 1994) (the women’s rights movement is for privileged western women and may not be relevant for third world women); Florence Butegwa, *Using the African Charter on Human and Peoples’ Rights to Secure Women’s Access to Land in Africa*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 495–514 (Rebecca J. Cook ed., 1994) (custom is the main barrier to women’s access to land); Rao, *supra* note 45, at 167–175 (women regularly suffer denials of human rights in the name of culture); Sullivan, *supra* note 40, at 795 (proposing a framework for resolving conflict between traditional religious practices and the international norm of gender equality).

52. See, e.g., THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS 62, 79 (1986).

53. For example, Noreen Burrows has argued that because of the diversity of forms of family life, culture operates as a barrier to the recognition of women’s rights. See Noreen Burrows, *International Law and Human Rights: The Case of Women’s Rights*, in HUMAN RIGHTS: FROM RHETORIC TO REALITY 80, 97 (Tom Campbell et al. eds., 1986). See generally Rebecca J. Cook, *State Responsibility for Violations of Women’s Human Rights*, 7 HARV. HUM. RTS. J. 125 (1994) (states avoid responsibility for violations of women’s rights, in part, by justifying violations as cultural practices).

54. Sullivan, *supra* note 40, at 821.

55. See Gaer, *supra* note 6, at 21–22. Since international law traditionally is only concerned with state actors, discrimination or abuse by non-state actors has not been considered

cultural exception, it is clear that there is a need to engage the cultural argument in defense of gender equality. There is no analogous debate over human rights, like freedom from torture or slavery. In this way, gender equality seems embedded in the private sphere in which culture operates rather than the public sphere in which other political and civil rights are located. The persistence of the public/private dichotomy mirrors both domestic law and the political realities of inter-state relations, in which state actors have been less protective of women's rights than other human rights. The next section explores the inter-state relations by focusing on the U.N. conferences during the Decade for Women. At these conferences, state representatives reinforced the idea that gender equality is often viewed as subject to a cultural exception.

B. U.N. Debates on Cultural Relativism

The debate over the universality of women's rights has been reflected in the development of the U.N. instruments on women's rights arising out of the U.N. Decade for Women and the subsequent related conferences at Cairo, Vienna and Beijing. During the U.N. Decade for Women (1975-1985) the United Nations focused attention on gender inequality at international conferences in Mexico City, Copenhagen, and Nairobi. Each of these conferences led to a final instrument that reaffirmed various aspects of women's rights. Significantly, each of these documents recognized the central role of women in family and society, rather than in government or commerce. The 1975 Mexico City Declaration on the Equality of Women and Their Contribution to Development and Peace stressed the equality of women within family and society, the right to choose one's spouse, and the right to decide whether to bear children.⁵⁶ The 1980 Copenhagen Final Document focused on "not only legal equality, . . . but also equality of rights, responsibilities and opportunities for the participation of women in development."⁵⁷ At Copenhagen, for the first time in a U.N. forum, the delegates recognized that violence against women and children was a legitimate concern of the international community.⁵⁸ The Secretary-General of the conference had urged delegates

a subject of international law. State responsibility for protecting women from discrimination or violence was ignored even by human rights advocates. For example, until recently Amnesty International would not investigate reports of violence against women by non-governmental actors. *See id.* at 21. Amnesty decided in December 1997, following the Beijing Conference, to expand its focus to include the failure of governments to stop the abuse of women. *See id.* at 21-22.

56. *See id.* at 13.

57. *Id.* (citing the *Report of the World Conference of the United Nations Decade for Women: Equality, Development, and Peace*, ¶ 3, U.N. Doc. A/CONF.94/35 (1980)).

58. *See id.*

not to raise the issue of violence against women because she believed it was a western issue that would not be recognized by Third World countries.⁵⁹ In fact, since the Copenhagen Conference, the right of women to be free from violence has become a more important issue for Third World human rights advocates.⁶⁰ The 1985 Nairobi Conference on Women asserted the right of women “to exercise effectively their rights in matters pertaining to population concerns, including the basic right to control their own fertility.”⁶¹ The conference called on governments to protect the rights of women in minority populations while respecting the cultural rights of these groups.⁶²

The U.N. 1993 Vienna World Conference on Human Rights was preceded by a series of regional preparatory conferences (“prepcoms”) in Tunis, Algeria, San Jose, Costa Rica, and Bangkok, Thailand.⁶³ These prepcoms exhibited intense cultural resistance to women’s rights. For example, at the Bangkok prepcom, some of the Asian representatives criticized the claim of universality of women’s rights and asserted that women’s rights were subordinated to cultural and religious practices.⁶⁴ In response to this cultural resistance, a meeting of non-governmental organizations issued a declaration rejecting cultural exceptions to women’s rights and criticizing religious extremism aimed at women.⁶⁵

The 1993 World Conference on Human Rights in Vienna marked a significant development in international women’s rights. The Conference recognized the importance of protecting women’s rights as a central plank in the international human rights platform.⁶⁶ In particular, the Vienna Declaration and Programme of Action treated violence against women as a denial of human rights.⁶⁷ At the Conference delegates from Europe and the United States challenged the use of culture and religion to deny women equality. The Vienna Declaration stressed:

[T]he importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain

59. *See id.*

60. *See id.* at 19.

61. *Id.* at 14.

62. *See id.*

63. *See id.* at 27.

64. *See id.* at 30.

65. *See Gaer, supra* note 6, at 29–30. *See generally* Engle, *supra* note 9, at 311–16.

66. *See id.* at 32.

67. *See id.*

traditional or customary practices, cultural prejudices and religious extremism.⁶⁸

The Vienna Conference framed the conflict between the rights of women and culture. By focusing on "harmful" cultural practices, "cultural prejudices and religious extremism," the delegates sought to distinguish between "authentic" cultural and religious values and "extremism." The implication then was that only extremist cultural and religious practices were suspect.⁶⁹ The Conference could not resolve the underlying conflict between women's rights advocates and defenders of cultural exceptions.

This conflict re-emerged vividly in the subsequent International Conference on Population and Development at Cairo. There, the Holy See joined with some delegations from certain Islamic countries to oppose abortion, extramarital relations, and homosexuality.⁷⁰ The final document recognized that the right of women to control reproduction was essential for the success of any population planning program. However, it provided that the implementation of its recommendations "is the sovereign right of each country, consistent with full respect for the various religious and ethical values and cultural backgrounds of its people."⁷¹

At the Cairo Conference two strategies emerged for resisting gender equality. First, the Cairo Conference endorsed the position that culture and religion were legitimate considerations in determining a woman's access to birth control;⁷² states could restrict such access based on cultural or religious values. This language represented a compromise between the United States, on the one hand, and Egypt and the Holy See, on the other. While the Holy See's primary concern was the issue of birth control, particularly abortion, it became clear at the U.N. Conference on Women at Beijing that the cultural question had larger implications. Second, some Third World delegations tried to link the

68. Vienna Declaration and Programme of Action of the World Conference on Human Rights, art. 38, U.N. Doc. A/CONF.157/23 (1993).

69. See Donna J. Sullivan, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152, 157-58 (1994).

70. See Mona Zulficar, *From Human Rights to Program Reality: Vienna, Cairo, and Beijing in Perspective*, 44 AM. U. L. REV. 1017, 1027-28 (1995).

71. *Report of the International Conference on Population & Development*, at Chapter II, U. N. Doc. A/CONF.171/13 (1994).

72. For a contrary argument that states may not assert religion as basis for not according women equal rights, see Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANS. L. 271 (1997) (the U.N. Charter required that race, sex and religious discrimination be treated equally and that the Charter prohibited a religious-based objection to upholding the human rights of women.)

issue of substantive gender equality with sexual orientation. By joining the rights of women and sexual minorities, the Holy See and certain developing countries hoped to stiffen resistance to gender equality.

Both of these strategies were evidenced during the regional pre-coms leading up to the Beijing Conference. Many delegations acknowledged the importance of overcoming cultural barriers to the full equality of women, but at the same time strong opposition emerged from a number of Third World countries.⁷³ At the New York global precom, several Latin American delegations objected to the use of the term “gender.”⁷⁴ They alleged that western feminists were employing “gender” as a Trojan Horse to expand the rights of homosexuals and transsexuals.⁷⁵ These delegations argued that recognizing the rights of sexual minorities was inconsistent with their cultural and religious values.⁷⁶ One Latin American Archbishop charged that feminists were promoting “unnatural genders” to “destroy family and moral values.”⁷⁷

The debate at the Beijing Conference focused on the universality of women’s rights and the question whether culture should trump gender equality.⁷⁸ Delegations from Malta, China, India, Cuba, Egypt, and the Holy See, among others, objected to language affirming the universality of women’s rights and sought to qualify this language by reference to cultural differences.⁷⁹ The Beijing Declaration in its preamble stated, “[w]omen’s rights are human rights.”⁸⁰ Yet, the Beijing Platform for Action reiterated the language of the Cairo conference that suggested women’s rights were culturally determined. The Platform declared that the implementation of these rights was subject to “the significance of and full respect for various religious and ethical values, cultural backgrounds and philosophical convictions of individuals and their communities.”⁸¹ Further, the Platform stressed the centrality of religious belief and practices and provided that to achieve gender equality, “there

73. See Gaer, *supra* note 6, at 41–54.

74. See *id.* at 44–46.

75. See *id.* at 46.

76. See *id.* See also Gregory M. Saylin, *The United Nations International Conference on Population and Development: Religion, Tradition and Law in Latin America*, 28 VAND. J. TRANSNAT’L L. 1245 (the First World should not use the United Nations to impose feminist values on Latin American culture and religion).

77. Gaer, *supra* note 6, at 46 (citing THE VATICAN AND THE FOURTH WORLD CONFERENCE ON WOMEN: DISTORTION OF THE DRAFT PLATFORM FOR ACTION (Catholics for a Free Choice)).

78. See *id.* at 51–53.

79. See Gaer, *supra* note 6, at 51–53.

80. Beijing Declaration and Platform for Action of the United Nations Fourth World Conference on Women, Annex I, ¶ 14, U. N. Doc. A/CONF.177/20 (1995).

81. *Id.* at Annex II, ¶ 9.

is a need to respect these rights and freedoms fully.”⁸² The outcome of this discussion reaffirmed the idea that women’s rights depend upon the cultural context.

It is illuminating to compare the qualified language of the Beijing Conference with the broader language of CEDAW.⁸³ CEDAW imposed on states a positive obligation to create substantive gender equality and to remove cultural barriers to the advancement of women.⁸⁴ The CEDAW implicitly acknowledged the need to reform culture to secure gender equality. The CEDAW obligated states to oppose cultural resistance to the advancement of women’s rights.⁸⁵ In response, a number of the signatory states ratified the CEDAW with explicit reservations that women’s rights were subject to cultural and religious beliefs and practices.⁸⁶ Certain countries, including Bangladesh, Egypt, Libya, and Tunisia, explicitly invoked Islam as the basis for their objections.⁸⁷ These countries, among others, have laws that require wives to obey their spouses, restrict the ability of women to work outside the home, limit their freedom to marry, prevent women from inheriting property, oblige women to hide their faces, arms and legs in public, deny women educational opportunities, prevent women from practicing certain pro-

82. *Id.* at Annex II, ¶ 24.

83. *See* CEDAW, *supra* note 32.

84. *See id.* at art. 2

85. *See id.* at art. 5.

86. For example, Singapore’s reservation stated: “In the context of Singapore’s multi-racial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to their religious or personal laws.” Similar reservations have been entered by Algeria, Egypt, Iraq, Kuwait, and Maldives, among others. *See* LOUIS HENKIN, GERALD NEUMAN, DIANE ORENTLICHER & DAVID LEEBRON, *HUMAN RIGHTS* 362–64 (1999). The view of the Islamic law represented by these reservations has been contested. *See generally* Abdullahi Ahmed An-Na’im, *supra* note 51, at 167–185. It is probably more accurate to speak of these reservations by Islamic countries as “cultural” than as strictly religious. Compared to all other human rights instruments, the CEDAW “has attracted the greatest number of reservations with the potential to modify or exclude most, if not all, of the terms of the treaty.” Belinda Clark, *The Vienna Convention Reservations Regime on the Convention on Discrimination Against Women*, 85 AM. J. INT’L L. 281, 317 (1991). Arguably, some of these reservations may be deemed incompatible with the purposes of the CEDAW and therefore, ineffective. The CEDAW provides in Art. 28(2) that “A reservation incompatible with the object and purpose of the present Convention shall not be permitted.” Moreover, Art. 19 of the Vienna Convention on the Law of Treaties does not permit reservations that are “incompatible with the object and purpose of the treaty.” Vienna Convention on the Law of Treaties, May 23, 1969, art. 19, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331.

87. *See* Ann Elizabeth Mayer, *Cultural Particularism as a Bar to Women’s Rights: Reflections on the Middle Eastern Experience*, in *WOMEN’S RIGHTS, HUMAN RIGHTS* 176, 177 (Julie Peters & Andrea Wolper eds., 1995); Akram Mirhosseini, *After the Revolution: Violations of Women’s Human Rights in Iran*, in *WOMEN’S RIGHTS, HUMAN RIGHTS* 72–77 (Julie Peters & Andrea Wolper eds., 1995).

fessions, including law, afford lesser weight to a woman's testimony in court, deny women the right to travel unless accompanied by a male family member, and prohibit women from driving.⁸⁸ Other state parties to CEDAW may have accepted the reservations of the Islamic countries out of "cultural sensitivity." In fact, western countries yielded to an interpretation of Islamic law that is highly contested within the Islamic world,⁸⁹ where there is substantial resistance by women to these laws.⁹⁰

In sum, the U.N. Conferences at Cairo, Vienna, and Beijing demonstrated the centrality of the conflict between international women's rights and some set of beliefs and practices posited as culture. Each of these conferences explicitly focused on the role of women within the family, rather than the contribution of women to the public sector. The debates and the documents produced by these conferences and the regional prepcoms evidence a move toward accommodating cultural concerns as a strategy for achieving diplomatic consensus. The need to address cultural concerns and the willingness to compromise the international rights of women reflected the intensity of cultural resistance to gender equality. In this context, states deployed the rhetoric of culture successfully to limit the expansion of global governance.

C. Female Genital Cutting

One of the most vivid examples of cultural resistance to women's rights concerns the Third World practice of female genital cutting.⁹¹ Supporters have defended female genital cutting as an essential cultural

88. *Id.*

89. See Venkatraman, *supra* note 38, at 2011 (concluding that the CEDAW is consistent with the Shari'a and rejecting criticism of women's rights by Islamic clerics as the "corrupt application of Islamic principles and incorrect interpretation of Islamic precepts for political expediency and social entrenchment.").

90. See generally LEILA AHMED, WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE (1992); Mayer, *supra* note 88, at 179-183; Abdullahi Ahmed An-Na'im, *supra* note 51, at 169-170, 177.

91. See Anna Funder, *De Minimis Non Curat Lex: The Clitoris, Culture and the Law*, 3 TRANSNAT'L. L. & CONTEMP. PROBS. 417 (1993) (female circumcision represents patriarchal social structure and cannot be justified by patriarchal culture.); Note, *What's Culture Got to Do With It?: Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944 (1993)[hereinafter "What's Culture Got to Do With It?"]. I am using the term "female genital cutting" to refer to several traditional forms of female genital mutilation or circumcision, including clitoridectomy, excision and infibulation, among others, which are widely practiced throughout Africa. See Female Genital Mutilation (FGM) or Female Genital Cutting (FGC), paper prepared by the Office of the Senior Coordinator for International Women's Issues, Bureau for Global Affairs and the Office of Asylum Affairs, Bureau of Democracy, Human Rights and Labor, U.S. Department of State, Jan. 15, 1999. For a more explicit description of the practice, see MARY DALY, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM 166 (1978).

practice.⁹² For example, Kenyan President Jomo Kenyatta argued, “the moral code of the tribe is bound up with this custom and that it symbolizes the unification of the whole tribal organization.”⁹³ Some women have suggested that female genital cutting may be consistent with human rights within a particular cultural context.⁹⁴ Others have argued that in thinking about genital cutting we cannot ignore the cultural values of Third World women.⁹⁵ One African academic in the United States has attacked the “hypocrisy” of U.S. feminists:

The feminist critique seeks to redeem women’s voices and realities from the eclipsing of male controlled social discourses and institutions. [note omitted] Insisting that no one community of norms is astute enough to trump the variegated values and standards of human experience, feminists argue that the white male ideal marginalizes, disempowers and renders the “other” invisible

Nevertheless, whether out of arrogance or fear of fracturing the base for mobilization, feminism manifests a tendency that betrays the partiality of its makers and entertains a party line that muzzles the merits of voices that do not simply echo the mainstream sentiments . . . Even if sincere, the assumption highlights the hypocrisy inherent in professing high-sounding principles of global sisterhood and the politics of experience, while meting

92. See generally L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997).

93. Rao, *supra* note 45, at 170 (citing JOMO KENYATA, *FACING MT. KENYA: THE TRIBAL LIFE OF THE GIKUYU* (1953)).

94. See Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN’S L.J. 155 (1985) (criticizes western feminist arguments against female circumcision and explores an alternative culturally sensitive approach invoking a right to health); Isabelle R. Gunning, *Arrogant Perception, World-Traveling and Multicultural Feminism: the Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1992); Alison Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 437 (1988) (examines whether a tradition of female circumcision may be regarded as a violation of human rights). Some feminists have conceded that point. Other feminists have argued that in thinking about female circumcision we cannot ignore the cultural values of third world women. See Hope Lewis, *Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. H. RTS. J. 1 (1995) (pointing out the need for more dialogue with Third World women who defend the practice.) Cf. Williams, *supra* note 44, at 263–268 (“feminist efforts to oppose FGC can easily hurt more than help unless these efforts are conceptualized as alliances with local feminists. . .”).

95. See Lewis, *supra* note 94, at 1 (pointing out the need for more dialogue with Third World women who defend the practice).

out a double standard that reinstates the very silencing and stigmatization of women that feminism challenges.⁹⁶

In particular, some feminist writers have pointed out that some young girls consent to be cut, and more often, mothers consent to, and may even participate in, cutting their daughter.⁹⁷ Critics “fail to consider seriously the possibility that women are not all the same and that legitimate differences might exist among them, particularly regarding issues such as clitoridectomy.”⁹⁸ In their view, it is arrogant and condescending to impose western ideas about bodily autonomy on others or to disregard the opinions of African mothers and girls as the product of “false consciousness.”⁹⁹ In the alternative, some feminists have suggested that instead of criticizing these practices we should “engage the exotic other,” and understand the practice of female genital cutting from the perspective of these women.¹⁰⁰

The willingness of some feminists to defend female genital cutting, or at least, to try to understand it in a cultural context, is itself revealing of the way that culture has shaped the discourse of women’s rights. We could argue with equal conviction that genital cutting is not entitled to any greater deference than the practice of slavery in North Africa, segregation in the United States, anti-semitism in central Europe or the conditions of prisons or poor houses in nineteenth-century Britain.¹⁰¹ In each example, we choose to endow some practices with the veneer of “culture,” while the others are merely “archaic” or barbaric. Even more fundamentally, the underlying assumption here is that feminism is a western idea transplanted to the Third World. Implicitly, this assumption denies the continuous struggle of Third World women for greater dignity within their own societies. The resistance of Third World women has been dismissed as the product of foreign influence, when in fact, their opposition is just as culturally authentic as is the support for genital cutting.¹⁰²

96. Obiora, *supra* note 92, at 311–12 (female genital cutting should be preserved, but regulated, out of respect for cultural identity).

97. See Boulware-Miller, *supra* note 94, at 156–58.

98. Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509, 1523 (1992). Engle points out that critics of female genital cutting are unwilling to acknowledge the extent to which culture is an obstacle to eliminating the practice or the degree to which women have consented to it. See *id.* at 1519–20.

99. *Id.*

100. See *id.* at 1512. See also Gunning, *supra* note 94, at 198–204.

101. See What’s Culture Got to Do With It?, *supra* note 91, at 1957–61.

102. See NARAYAN, *supra* note 48, at 29–39.

D. *The Norm of Gender Equality and the Third World*

The international community has acknowledged the importance of gender equality, yet by continuing to defer to culture, it excludes women from the reach of public international law. The assumption that gender equality is culturally dependent is embedded in the discourse of gender equality.

There are three responses to efforts to universalize women's rights. First, some Third World scholars accuse Western feminists of "essentializing" women.¹⁰³ The anti-essentialist argument is often framed as a conflict between feminism and culture.¹⁰⁴ Anti-essentialist arguments do not necessarily reject feminism or deny that gender equality may represent a universal value that transcends cultural boundaries.¹⁰⁵ Some anti-essentialist arguments simply assert that gender equality should be viewed within a particular ethnic or national context. In other words, anti-essentialism tends to emphasize culture over gender. Some anti-essentialists may see this shift in emphasis as a pragmatic-political strategy to gain support for gender equality. Other may see it as a recognition of post-colonialism and an effort to differentiate local culture from dominant western culture. Implicitly, by focusing their critique on gender equality, anti-essentialists reinforce the idea that other rights—the right to contract, property, political participation, or legal process—do transcend borders without regard for culture. These rights may also be gendered in the sense that they primarily reference men, who are engaged in the public realm of commerce, politics, and law.¹⁰⁶

A second response is that feminists are imposing western liberal values on other societies without regard for historical and cultural differences.¹⁰⁷ Some advocates for the Third World have rejected claims for gender equality as a universal human right as a form of cultural imperi-

103. See, e.g., Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1581–82 (1996) ("Cultural feminists developed the modern construct, 'woman' by privileging sex differences over any other basis of oppression and time and space. [note omitted] This version of feminism has been criticized as gender essentialism.") See also, Harris, *supra* note 15 (the dominant white culture essentializes women because of a lack of understanding of the experience of minority women).

104. See Martha Minow, *About Women, About Culture: About Them, About Us*, 129 DAEDALUS 125 (2000) (Professor Minnow characterizes this conflict as between the liberal, who defends individual women against group oppression, and the cultural defender, who rejects cultural imperialism and embraces group identity).

105. For a more nuanced view of this conflict, see Leti Volpp, *Multiculturalism Versus Feminism*, 101 COLUM. L. REV. 717 (2001).

106. See Charlesworth et al., *supra* note 42, at 625–27.

107. See Gunning, *supra* note 94, at 190–191.

alism.¹⁰⁸ Even some feminists express concern that women's rights may represent liberal western cultural biases:

In addition to these concerns for the inherent bias within international law against non-western cultures and women whatever their cultural background, the law generally also implies punishment and even forcible change. Even if one can inject a multicultural perspective and set of values into the law, how can mutual respect be maintained if the 'losing' cultural value can be punished or even forced to change?¹⁰⁹

This argument appeals to the West's sense of moral responsibility for the history of colonialism. A refined version of this argument is that Third World objections to universal human rights norms offer a different universal norm, rather than denying any norm. When Islamic countries raise objections to women working with men, we could perceive those objections as presenting an alternative view of women's rights rather than as a denial of gender equality.¹¹⁰

Ironically, by invoking culture in this connection, defenders of Third World countries are appropriating the same rhetoric once used to rationalize and legitimate colonialism. Whereas the Europeans referenced "high culture" as compensation for exploitation, subsequent generations of anthropologists have referenced Third World "culture," as a mark of underdevelopment and dependency. Why do we identify certain conduct as cultural? How we deploy the term itself reveals certain underlying value preferences. For example, by characterizing certain individual behavior, such as domestic violence, as cultural, we attribute certain bad acts to whole groups of people. We often label conduct as cultural when it performed by a member of a racial or ethnic minority or a developing nation. When a member of the majority in the United States or Europe commits the same conduct, we typically blame the individual and not the culture. This labeling tends to exaggerate ethnic differences and supports the idea that white European culture is superior.¹¹¹ Contrasting western liberalism with Third World culture reaffirms the existing status relations between the industrialized and

108. See, e.g., Pheng Cheah, *Posit(ion)ing Human Rights in the Current Global Con-juncture*, 9 PUBLIC CULTURE 233 (1997).

109. Gunning, *supra* note 94, at 193 (applying a culturally specific analysis to the question of female circumcision).

110. See Catherine Powell, *Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201, 208-15 (1999); Jeremy Waldron, *How to Argue for a Universal Claim*, 30 COLUM. HUM. RTS. L. REV. 305, 311-12 (1999).

111. See Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000).

developing states by implying that certain states are not sufficiently mature to assume responsibility for respecting women's rights.

Moreover, the cultural imperialism argument reifies certain historical and cultural distinctions and suggests that they should not be subject to foreign influence. This presumes that culture is static and bounded by the geography of sovereign states. One response to this argument is that national culture is an artificial social construct. Third World states are themselves the creation of western liberal ideology mapped onto the Third World. Imperialism produced Third World nationalism and sovereignty. The borders drawn by colonial powers do not determine the culture of Third World states. Family, tribe, village, religion, and commerce shape culture. These sources of culture cross and divide national borders. Which of these cultural influences is any more authentic than the views of women resisting gender inequality within Third World societies?¹¹²

More ominously, by juxtaposing national culture against women's rights, Third World advocates subordinate Third World women to the private exercise of male privilege.¹¹³ Assertions of national culture may overlook sub-cultures or groups that do not willingly submit to the national culture.¹¹⁴ By appealing to cultural generalizations in defense of

112. See Binder, *supra* note 9 (challenging the idea that culture is bounded by the nation state and arguing that state itself is an invention of western culture). See generally Guyora Binder and Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149 (1997).

113. See Ayelet Shachar, *Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation*, 6 J. OF POL. PHIL. 285 (1998) (reliance on rigid multicultural approach privileges ethnic group rights over women); Susan Moller Okin, *Is Multiculturalism Bad for Women?*, BOSTON REV. (1999), at <http://bostonreview.mit.edu/BR22.5/okin.html> (showing how minority cultures often gain recognition of group rights at the expense of minority women).

114. The relationship between cultural claims and women's rights has also been evident in U.S. domestic law. Increasingly, cultural defenses have been brought successfully in criminal trials in which the victim was a woman. In particular, Asian-American men who have assaulted or killed Asian-American women have argued cultural defenses. The cultural defense operates to maintain the subordination of Asian-American women in their traditional culture. See Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994) (the cultural defense should be balanced by an antisubordination principle that recognizes both the subordination of immigrant cultures and the subordination of immigrant women within those cultures). For example, a Chinese-American man killed his spouse and was acquitted of murder after arguing that Chinese custom allows husbands to kill unfaithful wives in order to relieve the husband of shame. See Cathy Young, *Equal Cultures—or Equality?*, WASH. POST, Mar. 29, 1992, at C5; Myrna Oliver, *Immigrant Crimes: Cultural Defense—A Legal Tactic*, L.A. TIMES, July 15, 1988, at 1; Diana C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and a Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994) (proposing that criminal defendants should be allowed to introduce a cultural defense only to explain their state of mind); see generally Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996) (cultural defenses should be barred in criminal trials); Nilda Rimonte, A

Third World sovereignty, these advocates reinforce western stereotypes of Third World countries as patriarchal, intolerant and undemocratic. For example, the willingness to accept cultural justifications for the denial of women's rights in Islamic cultures¹¹⁵ may derive from western stereotyping of "orientalism."¹¹⁶ Westerners reinforce negative stereotypes by explaining Third World cultural traditions in terms of the subordination of women. In so doing, the sympathetic westerner echoes the colonialist argument that pointed to the exploitation and abuse of Third World women as evidence of the backwardness of their colonies.¹¹⁷

A third objection to a universal norm of gender equality is that cultural exceptions to international legal norms are no more or less suspect than domestic legal exceptions to international law. The objection here rests on the idea that since culture is indeterminate, we can characterize the arguments raised by the United States against international legal norms as cultural just as we characterize the arguments of some Islamic States as cultural. For example, when Islamic countries object to extending certain rights to women based on the Koran, we regard that as cultural. Yet, if the United States objects to certain rights based on federalism concerns, we would characterize that objection as legal or constitutional. One scholar has suggested that there is no significant

Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense, 43 STAN. L. REV. 1311 (1991) (Asian culture facilitates decriminalizing violence against Asian women). Typically, the crime has involved acts by a Asian man against a woman. One critic of the cultural defense has charged:

In this paradigm, Asian American identity becomes predicated on adhering to cultural traditions that were created by men; and that privilege men. In such an equation, an attack on culture becomes an attack on male identity? Such bracketing of gender to preserve culture essentializes the Asian American woman's identity as a cultural caretaker and leaves Asian American women with fragmented selves. We can only exist as the essential Asian American women that Asian American men want us to be.

Chiu, *supra* note 114, at 1124.

115. See, e.g., Abdullahi Ahmed An-Na'im, *Islamic Law, International Relations, and Human Rights: Challenge and Response*, 20 CORNELL INT'L L. J. 317 (1987) (questioning the authority of certain interpretations of Islamic law that oppress women); Mayer, *supra* note 4 (Islamic women have resisted interpretations of Islamic law imposed upon them by political elites in Islamic countries). For an interesting discussion of the complex and often contradictory ways in which Islamic women have resisted and subverted fundamentalism through its own religious rhetoric and forms, see Lama Abu-Odeh, *Post-Colonial Feminism and the Veil: Considering the Differences*, 26 NEW ENG. L. REV. 1527 (1992).

116. See generally EDWARD SAID, *ORIENTALISM* (Vintage Books 1979) (Professor Said shows how Europeans artificially constructed the category of 'orientalism' in ways that subordinated cultural differences, denied history, and maintained European hegemony).

117. See NARAYAN, *supra* note 48, at 17 (1997); AHMED, *supra* note 90. Ahmed shows how the British characterized the veil as the suppression of Islamic women to legitimate British imperialism. *Id.* at 152-53.

distinction between constitutional arguments against CEDAW made by the United States and cultural or religious arguments against the CEDAW made by some Islamic countries.¹¹⁸ In this view, both the Constitution and the Koran are sacred texts in their respective societies and both could be viewed as cultural. This argument collapses the distinction between law and culture. If law is indistinguishable from culture, then it makes no sense to talk about cultural exceptions to legal obligations.

In my view, this objection fails to acknowledge the real difference between cultural arguments and legal arguments. Of course, law is both a product and an instrument of culture, but it is distinguishable from culture. When an Islamic state argues that religious dogma justifies its treatment of women, it is asserting that the practice represents the teaching of the Prophet or of God. By their nature, religious obligations are immutable and are not subject to political processes. By contrast, legal arguments are asserting only that the political process requires this result. Legal outcomes are always subject to change either by statute, constitutional amendment, or judicial interpretation. Law is about a very specific discrete temporal process. Legal objections can be overcome by changing the law. Culture and religion do change over time, but they are much more difficult to change. No single event or process can transform a cultural or religious belief.

The difficulty of changing culture reflects another basic difference: culture is not readily identifiable. Within a society, there are many sub-cultures that intersect. An Islamic woman may feel one set of cultural norms are appropriate among her family, and a different set of norms are appropriate among friends, classmates, or co-workers. To privilege any one set of cultural norms is to subordinate some other set of norms. There is no single authoritative voice for interpreting culture. Islamic scholars disagree about what the Koran requires. The text might be authoritative and fixed, but legal structures provide for authoritative interpretation. When a constitutional obligation is raised to an international legal obligation, we can debate the legal arguments and eventually reach a consensus, change the Constitution, or receive an authoritative interpretation from a court of law.

In the final analysis, these three objections to the universality of gender equality—the anti-essentialist objection, the cultural imperialist objection, and the cultural indeterminacy objection—do not explain why gender norms are subject to cultural arguments while other human rights norms are accepted as universal.

118. See Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW*, 23 HASTINGS CONST. L.Q. 727, 739 (1996).

E. Conclusion

The question to pursue is why we respect some customary practices concerning gender and sexuality as “culture,” and therefore, regard them as beyond the reach of international human rights norms. What accounts for the omnipresence of culture in discussions about women’s rights and the relative absence of a cultural component in discussions about other human rights?

Let us consider five possible explanations for why culture is a relevant exception to women’s rights, but not other human rights. First, one could argue that respect for human rights progresses slowly. The development of human rights norms lags behind social consciousness. We first condemn religious intolerance, then slavery, then other forms of racism, and only later does society reject sexism and homophobia. In institutional terms, the international structures for promoting the rights of women are relatively new and still weak. In time, we might expect to see more support for gender equality and the creation of international institutions for enforcing such rights. As an empirical matter, this description of social progress may be accurate, but it has no normative content. It does not explain why gender equality *should* be culturally dependent. Nor does it explain why gender inequality must be addressed at a later stage of human rights.

A second possible explanation is that the question turns on the definition of culture. Arguably, gender is culturally constructed in a way that it is impossible to talk about gender rights divorced from culture. That explanation is appealing, but it still begs the question. Certainly, slavery is well established for a long historical period among a certain class of persons in northern Africa. Persons born into slavery in northern Africa may even regard themselves as property.¹¹⁹ Slavery is no less culturally constructed than any form of gender subordination, but we do not excuse it.

119. For example, after five centuries, slavery remains prevalent in Mauritania, where an estimated 300,000 Africans are owned as chattel slaves, and Islamic leaders assert that the Koran outlaws abolition. See Elinor Burkett, *God Created Me to Be a Slave*, N.Y. TIMES, Oct. 12, 1997, section 6 (Magazine), page 56. Slavery is deeply rooted in the culture of Africa and elsewhere. Modern forms of slavery include chattel slavery (in Sudan and Mauritania), serfdom, forced labor (especially in China), debt bondage throughout the Third World, migrant workers (in the Americas), prostitution and sexual slavery (in Central and Eastern Europe and the former Soviet Union), forced marriage and the sale of wives (in Europe, North Africa, Asia and Latin America), and child labor (in Africa and Asia). See generally *Contemporary Forms of Slavery: Report of the Working Group on Contemporary Forms of Slavery on its Twenty-Forth Session*, U.N. ESCOR Comm. Oh Hum. Rts., Sub-Commission on Prevention of Discrimination and Protection of Minorities, 51st Sess., Agenda Item 6, para. 35–52, U.N. Doc. E/CN.4/Sub.2/1999/7 (1999).

Another explanation could be that states are unwilling to consent to women's rights in the absence of a cultural escape clause. Certainly, as a description of reality, that explanation seems compelling. For example The Holy See, Singapore, and Iran were unwilling to sign the Final Instrument of the Beijing Conference without some assurance that cultural exceptions were valid bases for derogating from the rights guaranteed to women. Why, however, did other states find the logic of this argument compelling? South Africa practiced apartheid, but other states did not agree that substantive racial equality was merely a cultural norm. This rationalization does not explain why other state actors and scholars accept the premise that women's rights are culturally specific.

A fourth explanation for subordinating women's rights to cultural exceptions is that the rights of women and sexual minorities contravene deeply held moral and religious beliefs of some groups. Arguably, the cultural exception here really is a religious or moral exception that the international community acknowledges out of religious tolerance. States generally impose certain moral or religious values on their citizens, for example, by prohibiting murder. Many of the rights contained in the Universal Declaration of Human Rights and the U.N. Covenants on Civil and Political Rights and Economic and Social Rights are not universally enforced, but they are universally acknowledged, even though some of them may contravene the religious and moral values and practices of some countries.¹²⁰ No one seriously argues a moral exemption to impose a caste system, even though some societies and religious groups have traditionally recognized such practices. Certainly some religious groups are offended by contemporary art, but it is not regarded as a justifiable reason for not complying with the international norms that respect free expression and access to culture. Some religions deny their own children access to an education, but international law does not recognize a religious exemption to the exercise of that right.¹²¹ It is inconceivable that the international community would ever permit any country to invoke a religious exemption for slavery, even though slavery is mentioned in both the Old Testament and the Koran and is widely

120. These include rights like prohibitions against discriminating on the basis of race, religion or caste (Decl. Art. 2), involuntary servitude (Decl. Art. 4), corporal and capital punishment (Decl. Art. 3, 4 and 5), interfering with the freedom to worship (Decl. Art. 18), impeding the free flow of information and ideas (Decl. Art. 19), limiting participation in government and voting (Decl. Art. 20), restricting the right to work and to choose one's job (Decl. Art. 23), and denying education (Decl. Art. 26) or free access to enjoy the arts. (Decl. Art. 27).

121. *But cf.* *Wisconsin v. Yoder*, 406 U.S. 205, 229–34 (1972) (the State's interest in compulsory education was insufficient to justify impinging on the free exercise of religion by the Old Order Amish, which objected to high school education for their children).

practiced in some countries.¹²² Yet, when Third World women are denied birth control, education, careers, property, freedom of movement, and suffer physical and emotional abuse, the international community defers to the cultural and religious sensibilities of these countries. The argument for a cultural exception to human rights is unpersuasive if it is only applicable to women and sexual minorities.

One other justification might be that matters that relate to gender, family or sexuality are “private” and therefore outside the scope of international law. However, as discussed above, the boundaries between the public and private realms are socially constructed, and sometimes, law crosses those boundaries. For example, the state intrudes upon the “privacy” of the family when it enforces marital laws, distributes property, or determines the custody of a child. The wall between what is private and what is public is permeable and moveable. The response to this argument is that gender equality is not intrinsically public or private. The real question is always why do we choose to put gender on the private side of that divide?

None of these arguments persuasively explains why the international community persists in viewing gender norms as “cultural,” when other human rights are not viewed as cultural; nor does it explain the willingness of state actors and legal scholars to condition the norm of gender equality on cultural circumstances. The cultural relativity of gender equality is difficult to defend in contrast to the absolute status of other human rights contained in the Universal Declaration and the U.N. Covenants. This paradox becomes more puzzling when we compare women’s rights to other international legal norms. What we find is that international economic law and international environmental law regularly conflict with important cultural and even moral values; yet, the

122. See *Report of the Working Group on Contemporary Forms of Slavery on its Twenty-first Session*, 1996, U.N. ESCOR, Hu. Rts. Comm., Sub-comm. on Prevention of Discrimination and Protection of Minorities, 48th Sess., Provisional Agenda Item 15, UN Doc. E/CN.4/Sub.2/1996/24 (1996). Slavery is flourishing in the Sudan. See Ian Fisher, *Selling Sudan's Slaves into Freedom*, Apr. 25, 1999, N.Y. TIMES, at A10. Worldwide traffic in slavery generates some \$6 billion annually. See *U.N. Economic Alternatives to Illicit Drug Cultivation, Trafficking Must Be Created*, M2 PRESSWIRE, Feb. 19, 1998 (Statement of Pino Arlacchi, Executive Director of the United Nations Office for Drug Control and Crime Prevention); See generally *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Seventh Session; First Session of the Board of Trustees of the Voluntary Fund on Contemporary Forms of Slavery: Report of the Secretary-General*, U.N. ESCOR, Hum. Rts. Comm., 52nd Sess., Provisional Agenda Item 15, U.N. Doc E/CN.4/1996/85 (1995); A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade under Customary International Law*, 39 VA. J. INT'L L. 303, 305-08 (1999) (noting that customary international law prohibits slavery despite its prevalence in the contemporary world).

international community generally does not acknowledge these claims as implicating culture.

In the sections following on international trade law and international environmental law, we will see how cultural exceptions are routinely dismissed. In the final section, we will explore possible explanations for reconciling the apparently different treatment accorded to culture in the context of gender equality, trade and environmental law.

III. CULTURAL EXCEPTIONS TO FREE TRADE

A. *The Norm of Nondiscriminatory Open Trade*

International trade in goods and services directly impacts every person in a society. What we consume and what we produce are determined in large part by the forces of the global marketplace. If foreign imports displace a domestic industry, it certainly affects the life of the community around that industry; if foreign imports introduce us to new tastes, experiences and ideas, that too affects the way we live. Despite the apparent connection between trade and social life, the international community does not generally acknowledge that trade norms implicate culture. State actors and legal scholars in general do not recognize cultural exceptions to international trade norms, unlike international norms of gender equality.

Before exploring the reasons for the disparate treatment of cultural exceptions, it is useful to understand the broad requirements of the international trading system known as the General Agreement on Tariffs and Trade (GATT).¹²³ Article I of GATT prohibited contracting parties ("member states")¹²⁴ from discriminating among imported goods from other member states.¹²⁵ Member states must accord "most-favored-nation treatment" to imports from any other member state. Most-favored-nation treatment means that a GATT member state cannot discriminate among member states for purposes of levying tariffs and imposing other import regulations. If the European Union allows the unrestricted sale of Canadian videos, they must allow the unrestricted sale of U.S. videos. Most-favored-nation treatment generalizes trade concessions so that the net

123. See General Agreement on Tariffs and Trade, October 31, 1947, 55 O.N.T.S. 194 [hereinafter GATT]. See generally TREBILCOCK & HOWSE, *supra* note 10.

124. Strictly speaking, GATT is not an organization, and therefore the parties to the agreement are not "member states." However, since the creation of the World Trade Organization ("W.T.O.") in 1994, all GATT contracting parties, with the exception of China (whose membership is impending), have become member states of the W.T.O. To avoid confusion I will use the term "member state" to refer to both the GATT and the W.T.O.

125. See GATT, *supra* note 123, at art. I.

effect is to lower trade barriers. For example, the United States might negotiate with Japan to lower the tariff on U.S. cassette discs imported to Japan to three percent from ten percent. In exchange, the United States might grant to Japan greater access to the U.S. telecommunications market. Now, Japan must accord the same tariff concessions to E.U. cassette discs that it accords to U.S. cassette discs, even if the Europeans offer Japan nothing in return. Article II of GATT provided that once a concession is offered it cannot be withdrawn.¹²⁶ If Canada lowers a tariff on paper products, it cannot subsequently raise the tariff without the consent of all the affected members of GATT.¹²⁷ Article III of GATT ensured that once an imported good enters a territory, it is treated the same as the equivalent domestic product.¹²⁸ If the European Union does not restrict the distribution of French videos, it may not restrict the sale of U.S. videos. Finally, Article XI of the GATT prohibited almost all quantitative restrictions on imported goods.¹²⁹ For example, a ban on imported automotive parts would violate Article XI. These four articles constitute the basic norm of nondiscriminatory open trade that governs virtually all trade in tangible goods, with certain limited exceptions, among the 140 GATT member states. The norm of nondiscriminatory open trade encourages import competition with domestic goods at prices that reflect the actual cost of production. In this way, nondiscrimination facilitates comparative advantage, yielding both production and consumption gains.¹³⁰

Some cultural commodities may be considered goods while others are considered services. Cultural goods would include tangible articles of trade like videos, books, and sound recordings. Cultural services would include intangible products like broadcasts, film and video distribution rights, and contracts for live artistic performances. The GATT negotiations known as the "Uruguay Round" in 1994 extended the general principles of GATT to services.¹³¹ The General Agreement on Trade in Services (GATS) applied most-favored-nation status and national treatment to international trade in services.¹³² Services were defined in the GATS as "any service in any sector except services supplied in the

126. *See id.* at art. II.

127. *See id.*

128. *See id.* at art. III.

129. *See id.* at art. XI.

130. *See generally* STEPHEN COHEN ET AL., *FUNDAMENTALS OF U.S. FOREIGN TRADE: ECONOMICS, POLITICS, LAWS, AND ISSUES* 56–69 (1st ed. 1996).

131. *See* TREBILCOCK & HOWSE, *supra* note 10, at 225–236.

132. *See* General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44 (1994), at arts. II, XVI and XVII [hereinafter GATS].

exercise of governmental authority.”¹³³ While GATS imposed a broad obligation not to discriminate against imported services, the guarantee of national treatment did not take immediate effect in all service sectors.¹³⁴ GATS required each member state to accord national treatment only to those services that the member state inscribed in its schedule for liberalization.¹³⁵ GATS obligated each member state to negotiate a schedule of specific commitments to progressive liberalization of services with other member states. These negotiations will continue through at least 2001.¹³⁶

GATT and GATS formed an international norm of nondiscriminatory open trade. There are important exceptions to this norm. Many developing countries do not strictly adhere to the norm¹³⁷ and are allowed to retain certain preferences.¹³⁸ Other preferential trading

133. *Id.* at art. I(3)(b).

134. *See* TREBILCOCK & HOWSE, *supra* note 10, at 233–35.

135. GATS, *supra* note 132, at art. XVII(1).

136. *Id.* at art. XIX. The European Union and its member states have adopted numerous and far-reaching audiovisual policies, which may create barriers to U.S. distribution of television broadcasting, films and videos. *See generally* Council Directive 97/36/EC, 1997 O.J. (L262) 60; Commission Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 1998 O.J. (C108) 6; Directive on Advanced Television Services; Green Paper on Advertising and Sponsorship, COM(96)121; Directive on Comparative and Misleading Advertising, 97/55/EC; MEDIA II Programme; Convention for the protection of the audiovisual heritage. The E.U. Television without Frontiers Directive of 1989 required that where practical at least fifty percent of all television broadcasting should be produced in Europe. The Europeans asserted that local content objectives for television programming were compatible with an implied cultural exception under the GATT or GATS. In addition, the Europeans also argued that television programming could be exempt from the GATT under the “cinema exception” of GATT Article IV. *See generally* Donaldson, *supra* note 2. The United States and the European Union after prolonged negotiations failed to agree on the status of audiovisual services. The practical result was to freeze in place the Television Directive. The European Union permitted some U.S. firms to form joint ventures with European firms to co-produce programs for European television. *See generally*, Sandrine Cahn & Daniel Schimmel, *The Cultural Exception: Does it Exist in GATT and GATS Frameworks? How Does it Affect of is it Affected by the Agreement on TRIPS?* 15 CARDOZO ARTS & ENT. L.J. 281 (1997) (concluding that there is no cultural exception in the GATS). As of March 2000, the European Union and the United States have not reached agreement on liberalizing audiovisual services. Although the Europeans have pressed for an explicit cultural exception for films, broadcasts and video, the parties did not agree to a cultural exception. Indeed, even the European Commission has conceded that there is no cultural exception in the GATS for audiovisual services. *See* Strategy Options to Strengthen the European Programme Industry in the Context of the Audiovisual Policy of the European Union: Green Paper for the Commission, COM(94) 29, adopted on April 7, 1994.

137. GATT allows developing countries broad latitude to take measures that are necessary for development and conserving foreign exchange. *See, e.g.*, GATT, *supra* note 123, at art. XVIII (providing that developing countries “shall be free to deviate temporarily” from GATT requirements).

138. *See generally* TREBILCOCK & HOWSE, *supra* note 10, at 301–30.

relationships, like the British Commonwealth countries, the European Union, the North American Free Trade Agreement ("NAFTA"), the Mercosur, and the U.S.-Israel Free Trade Agreement are permissible exceptions to the norm.¹³⁹ Nevertheless, there is a generalized expectation that all members of the W.T.O. are moving toward an ideal of nondiscriminatory open trade in goods and services. Although there may not yet be a legally binding prohibition on national barriers to all cultural services, the implicit understanding of member states is that they should reduce or eliminate such barriers over time.¹⁴⁰ Cultural goods are subject to GATT, and to a limited extent, some restrictions on cultural services already have been subjected to nondiscriminatory open trade rules under GATS.¹⁴¹

Neither the text of GATT nor GATS explicitly provided for any cultural exception to the norm of nondiscriminatory open trade. However, one could argue that GATT Article XX contained an implied cultural exception to GATT free trade requirements.¹⁴² GATT Article XX provided general exceptions from the nondiscriminatory open trade rules. Article XX (a) allowed contracting parties to adopt measures *inter alia* to protect "public morals."¹⁴³ This exception did not explicitly authorize states to impose trade restrictions to protect culture. Arguably,

139. See, GATT, *supra* note 123, at art. XXIV.

140. See TREBILCOCK & HOWSE, *supra* note 10, at 225-36.

141. With the marriage of telecommunications services and other audiovisual services, it is arguable that some audiovisual services may already be subject to the national treatment provisions of GATS as telecommunications. For example, on-line and cable services may be characterized as telecommunications, rather than traditional audiovisual services.

142. In addition to GATT Article XX, there are two other exceptions to the nondiscrimination norm that arguably recognized a cultural exception. GATT Article IV contained the only explicit cultural exception for cinematograph films. See GATT, *supra* note 123, at art. IV. Article IV permitted GATT parties to require that cinemas devote a minimum proportion of the total screen time utilized to domestically produced films. *Id.* at art. IV(a). Article IV also provided that parties should negotiate for the liberalization of restrictions on foreign films. *Id.* at art. IV(d). The British, Norwegian and Czech Governments insisted on this provision in the 1947 GATT to protect their national film industries. Although the GATT has never authoritatively determined that this exception did not apply to videotaped or filmed television programs, in practice it has been read narrowly to cover only cinematograph film. See Robin L. Van Harpen, *Mammas, Don't Let Your Babies Grow Up to be Cowboys: Reconciling Trade and Cultural Independence*, 4 MINN. J. GLOBAL TRADE 108, 168-170 (1995).

Article XIX, known as the "escape clause," provided that if a GATT concession results in an increase in imports that substantially cause serious injury or threatens a domestic producer of a like or directly competitive product, the importing state may suspend or withdraw the concession. See GATT, *supra* note 123, at art. XIX(1)(a). In principle, an increase in a cultural import that causes serious injury to a domestic producer could justify raising a tariff or imposing a voluntary export restraint agreement. However, such import restrictions are only permissible under GATT temporarily to allow time for the domestic industry to adjust. Article XIX may not be used as a permanent restriction on foreign cultural imports.

143. *Id.*, at art. XX (a).

it may be difficult to distinguish between a cultural exception and a measure to protect the public morals. For example, the United States limits the import of products produced by involuntary or indentured child labor.¹⁴⁴ You may import a hand-woven rug in the United States, but you may not import a rug produced by an indentured child. The import restriction is triggered by how the good is produced, rather than the category of good. In defense of this import restriction, one could argue that Article XX (a) permitted states to ban imports that offend public sensibilities or standards of decency and morality. Surely, the public would be offended by child labor, and the ban reinforces the moral standard against child labor. Similarly, the United States bans films and videotapes that government censors determine are pornographic, precisely to safeguard cultural standards of decency.¹⁴⁵ Thus, one could argue that the public morality exception in Article XX might be extended to protect the public from any import that threatens fundamental cultural values.¹⁴⁶

Article XX (f) provided another general exception to the GATT nondiscrimination principle for measures "imposed for the protection of national treasures of artistic, historic or archaeological value."¹⁴⁷ Obviously, the intended purpose here was to protect national patrimony from foreign art collectors. One could argue for a broad reading of Article XX (f) that allowed states to take measures to protect the contemporary domestic cultural industries that produce artistic treasures. Otherwise, GATT only permitted states to impose export restrictions to prevent the loss of artistic work produced by dead artists, not contemporary artistic work.

Despite these arguments, most authorities agree that Article XX must be read narrowly because terms like "public morals" and "national

144. See Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, § 634, 111 Stat. 1272, 1316 (1997).

145. See 19 U.S.C. § 1305(a) (1994). See also *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971).

146. See generally Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. OF INT'L L. 689 (1998) (analyzing the reach of the moral exception in GATT Art. XX and concluding that both the GATT and the GATS should be read as permitting broad moral exceptions to free trade; for example, the author argues that states have the right to ban the import of goods produced by child labor.); Tina W. Chao, Comment, *GATT's Cultural Exemption of Audiovisual Trade: The United States May Have Lost the Battle But Not the War*, 17 U. PA. J. INT'L ECON. L. 1127 (1996); Philip M. Nichols, *Trade without Values*, 90 NW. U.L. REV. 658 (1996); Anthony de Fazzekas, *Free Trade and Culture: An Alternative Approach*, 2 DALHOUSIE J. LEGAL STUD. 141, 154-55 (1993); Van Harpen, *supra* note 142; Michael Braun & Leigh Parker, *Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul?*, 22 DENV. J. INT'L L. & POL'Y 155 (1993).

147. GATT, *supra* note 123, at art. 20(f).

treasures" escape easy definition.¹⁴⁸ An expansive reading of Article XX would allow the exceptions to swallow the rule of nondiscrimination. For just that reason, the general exceptions contained in Article XX were limited by a prohibition against "arbitrary or unjustifiable discrimination."¹⁴⁹ Whether measures designed to safeguard public morals or cultural industries are justifiable might depend upon two factors. First, the importing country must prove the extent to which an actual direct threat existed to the public morals or to national artistic treasures. Second, the importing country must show the degree to which the measure undertaken related directly and proportionately to the perceived threat. In other words, to use Article XX, a member state would have to argue that imports were a proximate cause of injury or the threat of injury to the public morals or to a competing cultural industry.¹⁵⁰

As a practical matter, most cultural trade consists of the licensing of copyrights and constitutes a "service," which is generally covered by the GATS, subject to the schedule of commitments to liberalize. As discussed above, presently broadcasting and audiovisual services are not included in the schedule of commitments to liberalize.¹⁵¹ The United States successfully opposed the E.U. proposal for an explicit cultural exception clause in GATS. To the extent that broadcasting, audiovisual services, and publishing, now or in the future, may be covered by GATS, the Europeans and the United States continue to disagree whether GATS implies, or should contain, a cultural exception.¹⁵² Like GATT, GATS contained a general exception for measures "necessary to protect public morals."¹⁵³ Since the conclusion of the Uruguay Round, the European Union has maintained its 1989 Directive on Television Without Frontiers,¹⁵⁴ which provided that at least fifty percent of

148. See JACKSON, *supra* note 10, at 206–207. Cf. Charnovitz, *supra* note 146.

149. GATT, *supra* note 123, at art. XX.

150. Interestingly, leading treatises on the law of GATT hardly mention the general exceptions in Article XX for national treasures and public morals. Apparently, these authorities all read these exceptions narrowly. See, e.g., KENNETH W. DAM, *THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970); HUDEC, *supra* note 10; JACKSON, *supra* note 10; EDMOND MCGOVERN, *INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY* 400, 420 (1986); TREBILCOCK & HOWSE, *supra* note 10.

151. See GATS, *supra* note 132, at art. XIX.

152. See CAHN & SCHIMMEL, *supra* note 136, at 293–301.

153. GATS, *supra* note 132, at art. XIV (a): A note attached to Art. XIV states that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society." One might argue then that the same limiting principle should apply to the interpretation of "public morals."

154. Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid Down By Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23.

television programming broadcast by any European network must be produced in Europe. In effect, cultural services have neither been expressly excluded nor included under the national treatment provisions of GATS.

In addition to GATT and GATS, a state may be able to assert a cultural exception to the norm of nondiscriminatory open trade under other multilateral and regional trade agreements. Two prominent examples of a cultural exception clause were contained in the Canadian Free Trade Agreement ("C.F.T.A.") and the N.A.F.T.A.¹⁵⁵ Article 2005 of the C.F.T.A. excluded from the requirements of the C.F.T.A. all cultural industries subject to certain limitations.¹⁵⁶ The language of the C.F.T.A. defined cultural industries to include the production and distribution of books, periodicals, film, video and audio recordings, radio, television, and cable broadcasting.¹⁵⁷ Essentially, the C.F.T.A. included all copyrighted industries that already enjoy some protection from infringing imports under the copyright laws. In principle, the C.F.T.A. and NAFTA both permitted some restrictions on cultural imports. To the extent cultural-import restrictions conflict with the GATT or GATS, it is unclear whether the C.F.T.A. cultural exception trumps the GATT requirements. For example, the C.F.T.A. arguably would permit Canada to deny national treatment to a foreign copyright holder contrary to the national treatment provisions under the W.T.O. Trade Related Intellec-

155. Canada-United States Free Trade Agreement, Jan. 2, 1988, art. 2005(1), 27 I.L.M. 281 (1988) [hereinafter C.F.T.A.]; Annex 2106 of NAFTA incorporates by reference Art. 2005 and applies it to relations between Mexico and Canada as well. See North American Free Trade Agreement, Dec. 8, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993). The issue has arisen in connection with Mexico because Mexico has no cultural barriers against the U.S. cultural exports. Language creates its own cultural barrier. Mexico, instead, seeks access to the growing U.S. Latino population.

Similar to the NAFTA, Article 128 of the European Community Treaty requires that the European Community must "take cultural aspects into account in its action under other provisions of the Treaty."

156. Although cultural industries were generally excluded from the C.F.T.A., Art. 2005-07 eliminated certain restrictions on cultural imports. C.F.T.A., *supra* note 155, at arts. 2005-07. First, it eliminated tariffs on cultural imports. *Id.* Second, it required that fair compensation should be paid for any foreign investment in a cultural industry that was expropriated. *Id.* Third, it terminated a provision of the Canadian Income Tax Act that required that publications must be printed in Canada in order for advertisers to be permitted to deduct advertising expenses from their Canadian income. *Id.* at art. 2008. Finally, it ensured that U.S. copyrights would be respected when U.S. television programs were received by Canadians and rebroadcast. *Id.* at art. 2006. The United States could retaliate by seeking relief from unfair trade practices under section 301 of the Trade Act of 1974, 19 U.S.C. 2411 et seq. In addition, Article 2005(2) would permit the United States to retaliate against any Canadian cultural exception by taking measures against Canadian products of equivalent value. *Id.* at art. 2005(2).

157. C.F.T.A., *supra* note 155, at art. 2012.

tual Property Rights ("TRIPS") Agreement.¹⁵⁸ The United States has taken the position that under NAFTA the United States would be permitted to retaliate against Canada if it denied national treatment to a U.S. copyright holder, while Canada has taken the opposite view.¹⁵⁹ When Canada undertook cultural measures to limit the distribution of U.S. split-edition periodicals in Canada, the United States found a way around the cultural exception to NAFTA by challenging the Canadian law directly under the GATT national treatment provisions. The decision of the W.T.O. regarding Canadian cultural measures is discussed below in section C.

In sum, we have seen that GATT and GATS together have created a strong norm of nondiscriminatory open trade. Moreover, there is no specific exception in either the GATT or GATS for culture. Nevertheless, as we will see below, state actors often raise the possibility of a cultural exception to the nondiscriminatory open trade norm as a justification for import barriers.

B. *Inter-state Conflicts over Cultural Exceptions to Trade*

In March 1998, the United Nations sponsored a conference in Stockholm to discuss the threat posed by globalization to national culture. Delegates agreed to the need for a cultural exception to permit restrictions on foreign investment in cultural industries. In June 1998, Canada invited representatives from 19 countries, including the United Kingdom, Brazil and Mexico, to the first meeting of the International Network on Cultural Policies. The meeting discussed strategies for claiming cultural exceptions from the international norm of open trade. Canadian Culture Minister, Sheila Copps, who called the meeting, warned, "[w]e can't treat culture like any other commodity in the world," and insisted that cultural diversity "is at the very heart of our national identity."¹⁶⁰ The Network re-convened in Mexico in September 1999. Cultural ministers from 17 countries agreed "cultural goods and services, including audiovisual means, deserve special treatment, since they reflect national and regional cultural identities."¹⁶¹

158. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

159. For an analysis of this question, see Cahn & Schimmel, *supra* note 136, at 304–10. Article 2005(2) of the C.F.T.A. authorized either party to retaliate against any measure authorized by the cultural exemption up to an amount equal to the amount of harm suffered. C.F.T.A., *supra* note 155, at art. 2005(2).

160. Quoted in Howard Williams, *Culture Ministers Agree to Maintain Lobby to Offset Trade Negotiators*, AGENCE FRANCE-PRESSE, Jun. 30, 1998.

161. Second Informal Meeting of the International Network on Cultural Policies Work Report, Sept. 20–21, 1999.

These states share the concern that cultural imports, especially from the United States, have two kinds of harmful effects. First, cultural imports compete with domestic cultural products in the same way that imports may threaten any other domestic producer. U.S. video imports to France take market share away from French videos, and French video producers earn lower profits and lose jobs. This effect by itself cannot justify treating cultural imports differently. Import substitution threatens domestic producers and workers whether they produce videos or textiles. If consumers prefer the price or quality of imported goods, then domestic producers must either compete harder or suffer losses. In this respect, we cannot distinguish cultural imports from any other imports, and GATT does not generally permit protecting domestic industries. Second, cultural imports displace and transform domestic culture weakening the bonds that define nationhood. Cultural commodities shape the expectations and values of citizens: music may celebrate sexuality and rebellion; films and television may describe sexual and familial relationships in ways that may be shocking or unconventional; literature and fine arts may challenge the existing social or political order. Thus, cultural imports may be viewed as displacing domestic cultural industries or influencing the nation's values and behavior.

Many states claim a cultural exception for certain goods or services. The E.U. has been one of the leading opponents of U.S. cultural hegemony. In particular, France has claimed a cultural exception to restrict the import of U.S. television programs, videos, sound recordings, and film, and France has long maintained quotas limiting foreign film, television, and music.¹⁶² French Prime Minister Lionel Jospin recently assured the French Parliament that "[w]e want to make our European partners share the simple and fundamental idea that culture cannot be treated like goods."¹⁶³ France seeks to preserve its cultural institutions connected with written and spoken expression partly to safeguard the French language from the spread of English.¹⁶⁴ France has insisted that cultural

162. France, for example, has required that movie theaters must show French films at least 20 weeks out of the year. See Anthony DePalma, *Isn't So Simple To Be Canadian*, N.Y. TIMES, July 14, 1999, at E1.

163. Neil Buckley, *Brussels Fails to Find a Common Line*, THE FINANCIAL TIMES, Oct. 14, 1999, at 15.

164. French "Intellectuals fear that the French Language, long under siege by English needs defending." John Rockwell, *The Talk of Paris; French Strike a Linguistic Blow in Their Film Industry's Oscars*, N.Y. TIMES, July 19, 1993, at C11. Other critics suggest that France's true motive is protectionist. The cultural exception "is the ruse by which Paris justifies the very un-free-market subsidies it pays its domestic film and entertainment industries—which it says would otherwise be swamped by U.S. imports." Kevin Sullivan, *When France, US Agree—for Different Reasons*, BUSINESS TIMES (SINGAPORE), Feb. 20, 1998, at 11.

exception clauses be added to a range of multilateral instruments for trade liberalization.¹⁶⁵ For example, France blocked agreement in the Organization for Economic Cooperation and Development (OECD) on a Multilateral Investment Treaty (MAI), which would have affected \$500 billion in investments annually, because the United States refused to agree to a cultural exception within the treaty.¹⁶⁶ Moreover, France has aligned itself with other E.U. member states, francophone countries, and Canada in demanding the creation of a cultural exception to the GATT, GATS, and other liberalization agreements.¹⁶⁷

The French objections to free trade in cultural goods and services are shared by numerous other trading partners in different contexts. The largest U.S. trading partners, Canada and Mexico, have discussed the need for imposing limits on cultural imports.¹⁶⁸ South Korea has maintained strict controls on the import of foreign films, particularly Japanese films. Only recently, Korea has pledged to begin gradual liberalization of its cultural controls, while still maintaining its right to a cultural exception.¹⁶⁹ Malaysia and Singapore have resisted the inflow of foreign television and films, maintaining strict censorship in the name of defending national values. The Malaysian Prime Minister has warned against foreign television, "[t]oday they broadcast slanted news, tomorrow they will broadcast raw pornography to corrupt our children and destroy our culture."¹⁷⁰ Similarly, the Governments of India and Egypt, the world's largest film producing countries, as well as Australia have

165. See *French Film Industry Leaders Urge Renewed Battle on Cultural Exception*, 15 INT'L TRADE REP. (BNA) 1830 (Nov. 4, 1998); *France will be 'Inflexible,' in Defending Culture at W.T.O.: Jospin*, AGENCE FRANCE PRESSE, Oct. 12, 1999.

166. See Lawrence J. Speer & Gary G. Yerkey, *France Pulls Out of OECD Talks on Multilateral Investment Treaty*, 15 INT'L TRADE REP. (BNA) 1750 (Oct. 21, 1998); Sullivan, *supra* note 164, at 11.

167. See, e.g., Erwan Jourand, *Francophone Leaders Urge Greater Focus on Human Rights*, AGENCE FRANCE PRESSE, Sep. 5, 1999; Lawrence J. Speer, *Investment Pact in Jeopardy in OECD as Members Agree to Six-Month Pause*, 15 INT'L TRADE REP. (BNA) 723 (Apr. 29, 1998).

168. In 1999, Canadian and Mexican officials issued a joint communiqué calling for protection for cultural diversity. See *Americas/NAFTA: In Brief*, 16 INT'L TRADE REP. (BNA) 338 (Feb. 24, 1999).

169. See *Korean Filmmakers Desperate to Defend Screen Quota*, KOREA TIMES, Jun. 15, 1999; *Controversy Arises Over Import of Japanese Culture*, ASIAN ECON. NEWS KYODO NEWS INT'L, Feb. 7, 1994; Michael Newman, *Building Bridges: South Korea Slowly Retreats from Ban on Japanese Culture*, FAR E. ECON. REV., Nov. 24, 1994, at 114.

170. Jonathan Karp, *Cast of Thousands*, FAR E. ECON. REV., Jan. 27, 1994, at 46; ERHARD U. HEIDT, *MASS MEDIA, CULTURAL TRADITION AND NATIONAL IDENTITY: THE CASE OF SINGAPORE AND ITS TELEVISION PROGRAMMES* 162 (1987).

joined the Europeans in defending the need for some "cultural protection" to maintain their indigenous film industries.¹⁷¹

Some countries have sought to extend the cultural exception to include even agriculture and other consumer products not ordinarily regarded as cultural goods. Korea and Japan have defended protectionist measures against rice imports on the ground that rice farming is an ancient tradition central to their culture threatened by rice imports.¹⁷² Similarly, U.S. politicians defend agricultural subsidies for U.S. farmers to preserve the family farm as a pillar of American life.¹⁷³ Japan imposed higher domestic taxes on imported spirits like whiskey than it imposed on certain Japanese alcoholic beverages, like shochu, to protect beverages closely linked to traditional Japanese secular and religious occasions.¹⁷⁴ To preserve its beer traditions, Germany only permitted beer produced according to an ancient German recipe to be sold as "bier" in Germany.¹⁷⁵ Rice, liquor, and beer are only three examples of how broadly culture may be construed.

Almost all states seek to protect some aspect of their culture from competing imported commodities. With increasing frequency states are challenging the international legal norm of nondiscriminatory open trade by asserting a cultural exception. In the section that follows, we will consider the underlying assumptions of this argument.

C. Analysis of the Cultural Exception to Free Trade

The cultural exception to free trade rests upon three premises: First, states can distinguish cultural commodities from non-cultural commodities. Second, states can distinguish between foreign and domestic culture. Third, states can, and should, protect their own national culture against foreign influences. Each of these premises is faulty.

171. See *U.S. Urges Free Worldwide Trade in Movies, Radio Programs During Uruguay Round Talks*, 7 INT'L TRADE REP. (BNA) 1369 (Sept. 12, 1990). See generally SEAN MACBRIDE, *MANY VOICES, ONE WORLD* (1980).

172. See *Asian Farmers Protect Against Liberalizing Rice Imports*, ASIAN ECON. NEWS KYODO NEWS INT'L, Dec. 6, 1993; *South Koreans Upset by Rice Market Opening Plans*, ASIAN ECON. NEWS KYODO NEWS INT'L, Dec. 12, 1993; *Thais Opt for Patience to Counter Bias on Rice*, ASIAN ECON. NEWS KYODO NEWS INT'L, Mar. 21, 1994.

173. Less than three percent of the populations of Japan and the United States are farmers. In that light, the centrality of U.S. and Japanese farmers to their respective national cultures is questionable.

174. As discussed below, a GATT panel rejected these arguments. See Report of Panel in Japan-Customs Duties, Taxes And Labeling Practices on Imported Wines and Alcoholic Beverages, L/6216-34S/83, ¶ 1.1 (adopted Nov. 10, 1987) [hereinafter Japan Alcohol Panel Report].

175. The European Court of Justice rejected this argument as a disguised form of quantitative restriction on imports. See Case 178/84, Commission of the European Communities v. Federal Republic of Germany, 1987 E.C.R. 1227.

First, it is doubtful one can distinguish cultural commodities from any other goods or services. The meaning of a cultural import is itself subject to dispute. We do not generally regard beer, liquor, whale meat, or sports magazines as cultural goods, yet, as discussed below, states have argued that each of these commodities was a cultural good. Motion pictures are one of the leading commercial exports of the United States, but some Europeans see Hollywood films as an insidious agent of cultural imperialism. Many goods that we might agree are not cultural nevertheless have cultural reverberations. Manufacturers market soft drinks, automobiles, and jeans as expressions of individual freedom, sexuality, and rebellion. The Calvin Klein underwear ads boldly displayed in major cities throughout the world surely bear a not-too-subtle cultural message of relaxed mores, objectified male and female sexuality, and non-traditional gender roles. Advertisers both popularize cultural attitudes and lifestyles and transform them, so it is hardly surprising when some foreign governments object to U.S. advertising as overtly sexual or inappropriate. A traditional society may fear the influence of the Pepsi Generation no less than the music of Rage Against the Machine or the films of Steven Spielberg.

All commodities shape culture. Cultural anthropologists view culture as material production. Televisions, facsimile machines, personal computers, and cell phones have transformed our culture both because of the information they can disseminate instantaneously and because of the material values that they embody. A society of individuals who pursue the acquisition of extravagant electronics communicates different values from a traditional agrarian society. As western commodities like fast foods, the internet, and Palm Pilots facilitate a more rapid pace of living, cultural change will follow.

The second premise underlying the cultural exception to trade is that we can distinguish foreign and domestic culture. This premise is equally flawed. Throughout history, new cultural forms have followed migration, trade, and investment; the process of global acculturation is normal and vital for human society.¹⁷⁶ Culture is not bounded by national territory; it is the product of sub-national and transnational influences. Nations cross-trade culture. Among our art, literature, music, cuisine, dress, and social attitudes, we must acknowledge that much of what we regard as English, Japanese or American came from other

176. See SASKIA SASSEN, *GUESTS AND ALIENS* (1999). Sassen has shown that mass migrations have occurred throughout European history according to certain predictable patterns. This pattern has become more extreme under a regime where capital is almost completely free from government control while workers are relatively immobile. Historically, immigrants were welcomed into new countries as providing a rich source of labor and skills. See *id.* at 2-19.

sources. William Shakespeare wrote in an amalgam of ancient languages that we call "English" plays based upon stories that originated throughout Europe and presented in a style derived from the ancient Greeks. The Japanese constructed their written language and art from borrowed Chinese written characters and painting style. American cuisine evolved from an eclectic mix of German, Dutch, English, Spanish, Mexican, Chinese, Italian, and indigenous tribal ingredients. The writing of Gabriel Garcia Marquez, the painting of Hockney, the films of Truffaut and the social theory of Foucault shaped contemporary American art and literature. Latin American and African music continue to shape contemporary American and European music. These cross-cultural influences continue into the future.

The third premise of cultural exceptions to trade is that a state can and should protect its national culture from foreign influence. Even assuming that a state could distinguish between cultural and non-cultural commodities, and between foreign and domestic culture, how could a state seal itself off from foreign cultural influences? The practical difficulties of controlling the distribution of foreign films, television, music, and literature are immensely complicated by the availability of new technologies like DVDs, direct broadcasting, and the internet. A citizen with access to a phone line has access to any foreign entertainment they desire. Moreover, foreign culture influences domestic artists, writers, and performers. Even if Europe could prevent the distribution of U.S. films, it could not prevent the influence of U.S. film directors on its own directors. Nor will Europe be able to control the cross-cultural influences of travel and tourism. European students visiting the United States will return home demanding access to the same films and television that U.S. students enjoy. Ultimately, the only way a country could effectively insulate itself from foreign cultural influence would be to close its borders to all foreign trade and tourism, deny its own citizens travel visas, and censor its own media and artists. Cultural autarchy, in other words, is inconsistent with the condition of modern life or the principles of democracy.

Despite these analytical difficulties, states increasingly invoke a cultural exception to trade. Clearly, the growing volume of world trade has heightened concerns about foreign influences. As I will develop more fully below, what drives the urgency for import controls on cultural products is a displaced fear of globalization. Canada expressed that concern in adopting certain measures to defend its culture. The W.T.O. rejected the cultural exception argument in a recent decision brought by

the United States against Canada.¹⁷⁷ In rejecting Canada's defense to restraints on cultural imports, the W.T.O. implied that Canada's true motivation was economic protectionism masquerading as cultural. The next section discussing the Canadian case illustrates the curious relationship between economic interest and cultural exceptions. As will be shown, cultural exceptions to trade fail in part because they are tainted by economic interest. The rules of trade function to protect the rationality of the market from the irrationality of cultural preferences.

D. W.T.O. Decision on Canadian Cultural Measures

The Canadian Government has long complained of the overwhelming cultural shadow cast by the United States on Canadian culture.¹⁷⁸ Canadians perceive that they are peculiarly vulnerable to U.S. cultural exports because of the relative size of population, the concentration of population close to the U.S. border, the predominance of U.S. film, television, and music, and the absence of any language barrier.¹⁷⁹ Many Canadians believe that government support for a national culture is vital to define a sense of nationhood and pull together the disparate population centers spread across Canada.¹⁸⁰ In 1985, the Canadian Minister of Communications Benoit Bouchard asserted that, "[w]e believe that, just as retaining our territorial sovereignty is essential if we are to remain an independent nation, so it is true that we must always retain our cultural

177. WTO Dispute Panel Report on Canada-Certain Measures Concerning Periodicals, WT/DS 31/R (March 14, 1997)[hereinafter Panel Report]; WTO Appellate Body Report, Canada—Certain Measures Concerning Periodicals, WT/DS31/AB/R (adopted June 30, 1997)[hereinafter Appellate Report].

178. See, John Herd Thompson, *Canada's Quest for Cultural Sovereignty: Protection, Promotion, and Popular Culture*, in NORTH AMERICA WITHOUT BORDERS? INTEGRATING CANADA, THE UNITED STATES, AND MEXICO 269–83 (Stephen J. Randal et al. eds., 1992); Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 203 (1998); J. Michael Robinson, *The Information Revolution—Culture and Sovereignty—A Canadian Perspective*, 24 CAN.-U.S. L.J. 147 (1998); DePalma, *supra* note 162, at E1.

179. See generally ALLAN SMITH, *CANADIAN CULTURE, THE CANADIAN STATE, AND THE NEW CONTINENTALISM* (1990). U.S. cultural products represent 95% of what is shown in Canadian cinemas, 80% of Canadian television news broadcasts, 60% of Canadian book-shelf space and 80% of English-language magazines. See Robinson, *supra* note 178, at 144–48. Of course, what constitutes a U.S. cultural product is difficult to say. For example, most Canadians ignored the fact that until recently the Seagram Corp. of Quebec owned MCA/Universal, which is one of the largest entertainment companies located in the United States. Seagram purchased MCA/Universal from Matsushita of Japan in 1995. Do MCA/Universal films distributed in the United States represent Canadian, Japanese or U.S. cultural values?

180. See, e.g., *Id.*; Thompson, *supra* note 178.

sovereignty—the absolute right in the eyes of the world to use all the instruments at our disposal.”¹⁸¹

Since the 1950's, Canada has adopted a wide range of measures aimed at protecting Canadian culture, primarily from the predominant culture of the United States.¹⁸² These measures have led to a series of trade disputes between Canada and the United States over Canadian cultural protectionism.¹⁸³ The Canadian Government has regarded U.S. news and popular magazines as particularly threatening to Canada's sense of national identity¹⁸⁴ and has tried to limit the influence of U.S. publications and news media in Canada.¹⁸⁵ In particular, Canada restricted the publication of “split-run magazines” marketed in Canada. A split-run magazine has substantially the same content as a foreign publication, but contains advertisements aimed at the Canadian market. The Canadian Government argued that larger U.S. publications like *Time*

181. Canadian Minister of Communications Benoit Bouchard as quoted in 1985, according to Ivan Berniew, *Cultural Sovereignty and Free Trade*, in *ASSESSING THE CANADA-U.S. FREE TRADE AGREEMENT* 235, 241 (Murray G. Smith & Frank Stone eds., 1987).

182. See generally Goodenough, *supra* note 178 at 210–17. For example, Canada has restricted foreign ownership of television and radio stations. See Canadian Broadcasting Act of 1991, 1991 S.C. 119 (1985) (Can.). For a complete historical survey of Canadian broadcasting policy, see RICHARD COLLINS, *CULTURE, COMMUNICATION, AND NATIONAL IDENTITY: THE CASE OF CANADIAN TELEVISION* (1990). Canada also regulates foreign investment generally in cultural industries under the Investment Canada Act, R.S.C., ch. 28 (1985)(Can.), amended by ch. 65, 1988 S.C. 2094 (Can.), ch. 35, 1993 S.C. 1 (Can.) and ch. 44, 1993 S.C. 130 (Can.). Canada has extensive controls on U.S. films, music and literature. For example, Canadian regulations require music radio stations to play at least 35% “Canadian” music during the daytime. To determine the nationality of a piece of music points are awarded based upon whether a Canadian was predominantly involved in the music, performance, production and lyrics. At least two of these four categories must be predominantly Canadian to qualify. Thus, for example, the song “My Heart Will Go On,” by the Canadian singer Celine Dion is not deemed sufficiently Canadian, but “Rhythm of My Heart,” by the U.S. singer Rod Stewart is deemed Canadian because a Canadian wrote the music and the lyrics. Canada also requires that television stations must schedule at least 60% Canadian programs, many of which are actually U.S. produced television programs filmed in Canada. See DePalma, *supra* note 162, at 32.

183. See, e.g., Andrew M. Carlson, *The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports*, 6 MINN. J. GLOBAL TRADE 585 (1997). In 1997, Canada amended its copyright laws to provide “neighboring rights” in order to create additional revenues for Canadian cultural industries. See Bill C-32, An Act to Amend the Canadian Copyright Act, 2nd Sess., 35th Parliament (1997). Neighboring rights are derivative copyrights that benefit contributors to a copyrighted work. Neighboring rights protect persons who would not otherwise receive a royalty, such as musicians who perform on a recording. See generally John A. Ragosta, *The Information Revolution-Culture and Sovereignty—A U.S. Perspective*, 24 CAN.-U.S. L.J. 155 (1998).

184. See Panel Report, *supra* note 177, ¶ 3.29. According to the Canadian Government, in 1998 foreign magazines, particularly U.S. magazines, represented 81.4% of all newsstand circulation. See *id.*

185. See *id.*

Magazine, *Sports Illustrated* and *Premiere Magazine*, which ran split-run Canadian editions, threatened to supplant Canadian popular culture, unless Canada adopted these import restrictions.¹⁸⁶

In 1965 Canada enacted Tariff Code 9958 to prohibit the import of split-run or special edition periodicals that contained any advertisement directed to the Canadian market that did not appear in the home country edition of that periodical.¹⁸⁷ In 1993 the Time Warner Corporation found a way around the import barrier on split-run editions. Time began publishing a Canadian edition of *Sports Illustrated* by transmitting electronically the editorial content from its U.S. edition to a press in Canada.¹⁸⁸ Canadian politicians complained that *Sports Illustrated Canada* threatened to obscure Canadian sports culture and that other U.S. periodicals would soon flood the Canadian market with split-run editions.¹⁸⁹ In response, the parliament in 1995 amended the Excise Tax Act by imposing a tax on split-run editions equal to 80% of the value of all the advertising revenue earned by the edition.¹⁹⁰ In effect, the Excise Tax Act made it unprofitable to publish a split-run edition in Canada.

In May 1996, the United States challenged the Canadian restrictions on split-runs before a panel of the W.T.O. Dispute Settlement Body.¹⁹¹ The United States argued that these measures violated several GATT

186. See Aarow Scow, *The Sports Illustrated Canada Controversy: Canada "Strikes Out" in its Bid to Protect its Periodical Industry from U.S. Split-Run Periodicals*, 7 MINN. J. GLOBAL TRADE 245 (1998).

187. R.S.C. 1985, c. 41 (3rd Suppl.) as amended to 30 April 1996, s. 114, Sch. VII, Item 9958, (1996 Customs Tariff: Departmental Consolidation) Ottawa: Minister of Supply & Services Canada, 1996. Note that in 1988 Canada amended Tariff Code 9958 to allow Canadian publishers to print all or part of their Canadian issues in the United States. See Panel Report, *supra* note 177, ¶ 2.5.

188. See Panel Report, *supra* note 177, ¶ 3.25.

189. See Panel Report, *supra* note 177, ¶¶ 3.26–27.

190. See Bill C-103, An Act to amend the Excise Tax Act and the Income Tax Act, S.C. 1995, c. 46. This provision tightened the definition of a split-run edition to include any periodical distributed in Canada in which more than 20 % of the editorial content is substantially the same as foreign editions and contains at least one advertisement that does not appear identically in foreign editions. See Panel Report, *supra* note 177, ¶ 2.6–2.7. Canada "grandfathered" certain split-run magazines that were produced in Canada prior to *Sports Illustrated Canada*, notably including *Time Canada* and *Reader's Digest*. See *id.* ¶ 2.8.

The Government also authorized Canada Post to charge preferential rates for commercial Canadian publications, and the Government funded Canada Post to grant special rates to certain domestic publications designated by the Department of Canadian Heritage for the purposes of promoting Canadian culture. See *id.* ¶¶ 2.10–11.

191. The United States brought its complaint to the W.T.O., rather than to the NAFTA, to escape the cultural exceptions provision contained in the C.F.T.A. Art. 2005(1) and incorporated by reference into Annex 2106 of NAFTA. See *supra* note 155. C.F.T.A. Art. 2005(1) excludes cultural industries from the national treatment requirement of the C.F.T.A. See *id.* at 2005(1). Under the C.F.T.A. the United States probably would not have been able to make a claim against Canada for protecting its periodical industry.

provisions.¹⁹² The United States principally argued that the Excise Tax Act violated GATT Article III national treatment by imposing a discriminatory tax on U.S. split-run edition advertising revenue.¹⁹³ The first sentence of Article III (2) provided that contracting parties should not subject the imported products of another contracting party to "internal taxes . . . in excess of those applied, directly or indirectly, to like domestic products."¹⁹⁴ The United States claimed that imported split-run

192. In addition to the principal U.S. claim discussed in the text, the United States charged that the ban on imported periodicals in section 9958 of the Tariff Code violated the prohibition on import bans contained in GATT Article XI. *See* Panel Report, *supra* note 177, ¶ 3.1. *See also* GATT, *supra* note 123, at art. XI. Canada argued that GATT Article XX(d) permitted Tariff Code 9958 as a measure "necessary to secure compliance with laws or regulations" not inconsistent with the GATT. *See* Panel Report, *supra* note 177, ¶ 3.2 and ¶ 3.5. Canada denied that these measures had a protectionist purpose. Canada asserted that one purpose of the import ban was to secure compliance with Section 19 of the Income Tax Act, which allowed advertisers to deduct the expense of advertising directed to the Canadian market only on condition that the ads were placed in Canadian periodicals. Canada asserted that the Excise Tax merely protected a national vehicle for the expression of Canadian values and ideas. Canada pointed out that the prohibition on imports did not prevent U.S. publications from distributing their U.S. editions in Canada. The Panel, however, rejected the argument that Tariff Code 9958 secured compliance with the advertising deduction in Section 19. The Panel found that the import ban on split-run magazines was inconsistent with the literal terms of Art. XI and that it was not justifiable under Art. XX(d). *Id.*, ¶¶ 5.5–11. The United States also argued that the postal subsidies provided by Canada Post violated GATT Article III national treatment because it treated U.S. magazines differently from Canadian magazines. *See id.* ¶ 5.2. Canada denied that the postal subsidies discriminated against foreign publications in violation of Article III national treatments. *See id.* ¶ 5.2. Canada argued that the postal subsidies were available only to some domestic publishers that satisfied the qualifications set out by the Department of Canadian Heritage, and all other domestic and foreign publishers were subject to the same commercial rates. GATT Article III (8) specifically permitted subsidies to assist domestic industries. *See id.* ¶ 3.150. The United States argued that subsidies were only permissible if paid directly to the domestic producer. Here, the subsidies were paid to Canada Post for the purposes of offering qualified industries lower postal rates. *See id.* ¶ 3.146. Canada also argued that Canada Post had a separate legal personality from the Government and therefore, its actions were not "regulations" attributable to the Government for the purposes of Article III national treatment. *See id.* ¶¶ 3.151–152. The United States disputed the idea that a contracting party could have created a separate corporate entity with authority to take actions in violation of the GATT without the contracting party being responsible for the corporation's acts. *See id.* ¶¶ 3.157–158. The U.S. position was internally inconsistent with regard to the postal subsidies. On the one hand, the United States argued that the Government and Canada Post were the same entity. On the other hand, the United States argued that a transfer of funds to Canada Post, rather than to Canadian publishers directly, was not a permissible domestic subsidy under GATT, because Canada Post was the direct beneficiary of the subsidy. *See id.* ¶ 3.198. The Panel concluded that the differential postal rates for domestic and foreign magazines were inconsistent with Art. III(4), but that the funded rates paid to Canada Post were permissible domestic subsidies under Art. III(8). *Id.* ¶ 5.38–44. On appeal, the Appellate Body reversed the Panel's finding and determined that the funded postal rates were not justified under Art. III(8). Appellate Report, *supra* note 177, at 35–38.

193. *See* Panel Report, *supra* note 177, ¶ 3.1.

194. GATT, *supra* note 123, at art. III.

magazines were “like domestic” Canadian magazines, and therefore, imported split-runs could not be subject to discriminatory excise taxes.¹⁹⁵ In the event that the Panel did not find that imported split-run magazines were like domestic Canadian magazines, the United States argued that imported split-run magazines were at least “directly competitive or substitutable” goods.¹⁹⁶ The United States pointed to the second sentence of Article III (2), which provided that “no contracting party shall otherwise apply internal taxes . . . to imported . . . products in a manner [so as to afford protection to domestic production].” According to the interpretative notes attached to the 1994 GATT, this second sentence applied where the taxed import and the untaxed domestic product were “directly competitive or substitutable,” even if they were not necessarily “like” products.¹⁹⁷

Canada responded first that the excise tax applied to advertising revenues and not to the magazine itself.¹⁹⁸ Thus, in Canada’s view the dispute concerned access to advertising services and should be subject to the General Agreement on Trade in Services [GATS], rather than to GATT, which applied only to tangible goods. Under GATS Canada did not make any commitment to grant national treatment to advertising services provided by other contracting parties.¹⁹⁹ The Panel, however, found that both GATT and GATS applied in this circumstance.²⁰⁰

Second, Canada asserted that even if the GATT did apply, a split-run edition was not a “like product” for purposes of Article III national treatment.²⁰¹ Canada argued that magazines, unlike other commodities, were intended for intellectual consumption, and as such, the intellectual content of the magazine was the most important characteristic for purposes of determining “like products.”²⁰²

To a large extent the arguments presented to the Panel turned on this question whether a foreign split-run periodical is a “like” or “directly

195. See Panel Report, *supra* note 177, ¶ 3.32. The United States also argued that in the event the Panel decided that the excise tax was not subject to Art. III(2), it should apply Art. III(4). The United States asserted that the Excise Tax Act violated Art. III(4) which provided that imports of a contracting party “shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale. . . .” *Id.* ¶¶ 3.144–145.

196. *Id.* ¶ 3.111.

197. “A tax conforming to the requirements of the first sentence [of Art. III(2)] would be considered to be inconsistent with the provisions of the second sentence. . . where . . . a directly competitive or substitutable product . . . was not similarly taxed.” GATT, *supra* note 123, at annex I, and art. III(2).

198. See Panel Report, *supra* note 177, ¶ 3.33.

199. *Id.* ¶¶ 3.33–34.

200. *Id.* ¶¶ 5.18–19.

201. See *id.* ¶ 3.61.

202. See *id.* ¶¶ 3.61–63.

competitive” product. Canada focused on editorial content alone to the exclusion of other criteria because content was the only distinguishing characteristic between foreign and domestic magazines. The United States pointed to W.T.O. precedents in support of the proposition that a like product’s characteristics must be determined with reference to its end use, consumer tastes, substitutability and its physical properties.²⁰³ According to the United States the end use of a magazine was its market appeal. A publication’s style, frequency, appearance, paper, size, type, texture, thickness, and even scent determined market appeal no less than its editorial content.²⁰⁴ At its heart, this disagreement mirrored an underlying value difference between the United States and Canada; in the view of the United States, there was no essential difference between cultural commodities like magazines or books and other commodities like automotive parts.²⁰⁵ Canada argued for special treatment for cultural goods, but the United States responded that GATT only provided a special exception for films.²⁰⁶ For Canada, the end-use of a magazine was not marketability, but the transmission of ideas and culture.²⁰⁷ By insisting that cultural goods have no equivalent import, Canada denied that culture could be commodified. The skeptical U.S. response reflected the view that culture was already in fact a commodity, and therefore, the United States regarded the Canadian motive as indistinguishable from protecting any other domestic industry threatened by imports.²⁰⁸

If the Panel determined a product’s character by reference to its cultural content, then no two cultural goods could ever be truly “like products,” and correspondingly, GATT Article III national treatment would never apply to cultural goods. Canada’s argument in principle would exempt all cultural imports from the GATT. If the Panel had accepted the Canadian position, it would have established by implication a

203. *See id.* ¶¶ 3.64–.70, 3.78.

204. *See id.* The United States rejected Canada’s argument that the distinguishing characteristic was the difference between original and non-original content. The consumer demand would not be determined by the originality of the content; nor could a consumer know whether the content was original or duplicated from a U.S. edition. In fact, the excise tax did not distinguish between original and non-original content. A magazine that had no original Canadian content was not subject to the tax if it were not sold outside Canada. The same publication would be subject to tax if it were sold outside Canada and contained at least one advertisement that was not identical to advertisements that appeared abroad. *See id.* ¶ 3.72.

205. *See Panel Report, supra* note 177, ¶ 3.66–3.85.

206. *See GATT, supra* note 123, at art. IV (providing that contracting parties could impose certain quantitative regulations on foreign films).

207. *See Panel Report, supra* note 177, ¶¶ 3.61, 3.68.

208. The United States’ view of restrictions on the movement of magazines also reflects the view that limits on the free flow of information threatens individual speech rights.

cultural exception to GATT's nondiscriminatory trade norms. From the Canadian perspective, the United States was insensitive at best, and dishonest at worst, in denying the impact of its own cultural hegemony. The Canadians characterized the U.S. argument as "a blanket denial that cultural products have any specificity that distinguishes them from ordinary items of trade."²⁰⁹ Canada pitted itself against the American cultural Goliath in defense of Canadian culture.

From the U.S. perspective, the Canadians were protecting an industry that happened to be engaged in popular culture; the cultural exception merely masked the true economic motive for the Canadian intervention in the market. The Canadians were trying to eliminate competition from their market.²¹⁰ Ironically, the Canadian excise tax had the opposite effect of protectionist legislation. Rather than keeping imports out and favoring domestic production, the Canadian excise tax punished *Sports Illustrated* for moving its production to Canada.²¹¹ The Canadians pointed out that they were not protecting Canadian publishing jobs. The excise tax did not depend upon whether Canadians wrote or produced the magazine. *Sports Illustrated* could still sell the U.S. edition directly to Canadians without having to pay the excise tax.²¹² The Canadians argued that the excise tax rewarded publications for using local editorial content, which better reflected the nation's interests and values.²¹³

The Panel agreed with the United States that the excise tax and the prohibition on imported split-run periodicals were GATT illegal.²¹⁴ It accepted the U.S. view that U.S. split-run periodicals were "like" Canadian magazines.²¹⁵ The Panel rejected Canada's theory that cultural imports were defined by their content rather than by their marketability²¹⁶ and implicitly suggested that Canada's true motive was economic, not cultural:

Despite the Canadian claim that the purpose of the legislation is to promote publications of original Canadian content, this definition essentially relies on factors external to the Canadian market—whether the same editorial content is included in a

209. Panel Report, *supra* note 177, ¶ 3.143.

210. *See id.* ¶ 3.120.

211. Arguably, since the magazine was published in Canada, Art. III was not applicable. Art. III(2) of GATT only applies to products "imported into the territory" of another party. *See* GATT, *supra* note 123, at art. III(2).

212. *See* Panel Report, *supra* note 177, ¶ 3.129.

213. *See id.* ¶ 3.5.

214. *See id.* ¶¶ 5.13–.30.

215. *See id.* ¶ 5.25.

216. *See id.* ¶¶ 5.23–.26.

foreign edition and whether the periodical carries different advertisements in foreign editions.²¹⁷

The Panel reasoned that if a Canadian-owned magazine produced a Canadian edition and a U.S. edition with some different advertisements and editorial content, the Canadian edition would be subject to the excise tax.²¹⁸ In this hypothetical it would not matter that both editions were otherwise designed for the same readership. No matter how “like” these editions were, one would be subject to the excise tax in derogation of the GATT Article III.²¹⁹ Ignoring the circularity of its own analysis, the Panel concluded that since the imaginary Canadian and U.S. editions *could* be “like products,” all split-run publications and domestic non-split-run publications *were* like products.²²⁰ In effect, the Panel endorsed the U.S. view that two cultural products with the same end-use are like products, which excluded the possibility of a cultural exception to GATT article III national treatment.²²¹ The Panel, however, avoided reaching this conclusion explicitly. Instead, the Panel added somewhat cryptically that “[t]he ability of any Member to take measures to protect its cultural identity was not at issue in the present case.”²²²

Canada appealed to the W.T.O. Appellate Body *inter alia* on the issue whether the split-run periodicals and Canadian non-split-run periodicals were like products. Canada claimed that the Panel had avoided deciding this central issue. The Appellate Body concurred with the Panel that the relevant criteria for determining like products included the product’s end-use, consumer preferences and the product’s properties, nature, and quality.²²³ However, the Appellate Body rejected the Panel’s analysis, which was based on a comparison of a hypothetical split-run magazine with a domestic Canadian magazine.²²⁴ The Appellate Body pointed out that the Panel assumed what it was asked to determine, namely, whether the magazine was sufficiently similar to deem the domestic and split-run editions like products.²²⁵ Therefore, the Appellate Body voided the Panel’s findings that split-run and domestic

217. *See id.* ¶ 5.24.

218. *See id.* ¶ 5.25.

219. *See id.*

220. *See id.* ¶ 5.26

221. Of course, there is no formal rule of stare decisis in the GATT. Therefore, it is conceivable that a subsequent panel decision could reverse these findings. However, as a practical matter, it is rare that a panel has approached a decision without reasoning from precedents. *See*, Raj Bhala, *The Myth about Stare Decisis and International Trade Law*, 14 AM. U. INT’L L. REV. 845 (1999).

222. Panel Report, *supra* note 177, ¶ 5.45.

223. *See* Appellate Report, *supra* note 177, at 22–23.

224. *See id.* at 22–23.

225. *See id.*

periodicals were like products, but the Appellate Body still upheld the U.S. complaint.²²⁶ The Appellate Body found that even if they were not like products, split-run and domestic periodicals were directly competitive or substitutable products for purposes of the second sentence of GATT Article III (2).²²⁷ The Appellate Body found that *Time*, *Time Canada* and *MacLean's*, for example were competitive or substitutable, even though *MacLean's* featured more Canadian editorial content.²²⁸ Since the excise tax was applied to split-run editions that were directly competitive or substitutable, the tax "afforded protection to domestic production," in violation of GATT Article III (2).²²⁹ The Appellate Body opined that even if cultural imports differed from domestic products, so long as the cultural import competed with the domestic product for the same end use, Article III prohibited an internal tax used to protect the domestic industry.²³⁰ Thus, the Appellate Body concluded that Canada should eliminate the excise tax on split-run periodicals.²³¹

In the end, both the Panel and the Appellate Body implicitly rejected Canada's claim that cultural goods cannot be subject to GATT national treatment requirements. The rhetorical structure of these opinions obscured two significant aspects of the relationship between cultural claims and the norm of free trade. First, the cultural claim was not explicitly discussed in either opinion, because the cultural exception was encoded in the determination of what is a like, directly competitive or substitutable product. The legal argument translated a claim about cultural sovereignty into a more technocratic argument about the common characteristics of different products. Both the Appellate Body and the Panel ultimately concluded that a cultural import could have enough in common with a domestic cultural good to apply the national treatment

226. *See id.* at 22–24.

227. *See id.* at 31.

228. *See id.* at 30–31.

229. *See id.* at 34.

230. *See id.* at 37–38. In addition to these findings, the Appellate Body reversed the Panel's finding that the funded postal rates were justified under Article III (8). *See id.* at 37.

231. Since the Appellate Body's report, the United States and Canada negotiated a settlement allowing U.S. split-run editions to include up to 18% Canadian advertising phased in gradually over three years. *See Canada Enacts Magazine Law Restricting Foreign Split-Run Advertising*, 16 INT'L TRADE REP. (BNA), No. 25, at 1054 (June 23, 1999). Canadian publishers opposed the compromise as a threat to Canadian identity. Within Canada the dispute over cultural protectionism continued. One Member of Parliament opposing an earlier draft of Bill C-55 said that his constituents had argued, "[p]lease do not let this crazy effort by the minister of heritage destroy our jobs and impair our industry by provoking the Americans into a bilateral trade war." Reform Party MP Jason Kenney as quoted in *Canadian Government Uses Limit on Debate to Push Forward Magazines Legislation*, 16 INT'L TRADE REP. (BNA), No. 10, at 411 (Mar. 10, 1999). Another member defended Bill C-55, as respecting Canada's culture: "Canada will defend its rights as a sovereign country to develop measures designed to support our domestic cultural expression." *Id.*

standard. In so doing, they implicitly denied Canada's assertion that no two cultural goods are comparable. Thus, Canada failed to persuade the W.T.O. that there is an implied exception to national treatment for cultural goods. Second, the United States argued that Canada's cultural claim was thinly disguised economic protectionism. In the U.S. view, the Canadians were only interested in protecting the source of advertising revenues for Canadian publications. If Canada only wanted to advance an economic interest, then its intervention into the market was prohibited by international open trade norms. The United States cast doubt on Canada's motive by characterizing that motive as economic. In other words, economic motives were disfavored by the free trade norm. The significance of this observation is discussed in the concluding section below.

As a result of the W.T.O. decision, Canada agreed to allow U.S. split-run periodicals into their market.²³² In so doing, Canada conceded the cultural exception claim to the international norm of free trade.

E. Other Cultural Exceptions to GATT

The Canadian periodicals case was not an isolated example of GATT hostility toward claims of cultural exceptions. GATT panel reports have consistently refused to recognize such an exception. For example, in 1984, a GATT panel rejected a cultural exception argument offered by the Government of Japan in defense of certain quotas on leather imports.²³³ The Government of Japan had established an import licensing scheme dating back to 1949 to limit the import of certain leather goods in order to protect the cultural minority community known as the "Dowa." The Dowa were regarded as the lowest social class in Japanese society since the early seventeenth century. For centuries, Japanese discriminated against the Dowa minority in all aspects of social life. The Dowa were restricted to certain occupations, which were regarded as beneath other Japanese. One of the primary occupations open to the Dowa was leather production. The Dowa tended to work in small leather businesses that were not economically viable, and they lived in extreme poverty. Japan contended that without import quotas, the Dowa leather industry would collapse causing severe social and economic dislocation to this oppressed minority community and destroying traditional Dowa culture.²³⁴

232. See James McIlroy, *The International Implications of the Canada-U.S. Magazine Dispute*, 2 J. WORLD INTELL. PROP. 1031, 1040-47 (1999).

233. See GATT Dispute Panel Report on Japanese Measures on Imports of Leather, L/5623-315/94, ¶ 44 (May 15, 1984)[hereinafter Japan Leather Panel Report].

234. See *id.* ¶ 21-22.

The United States objected inter alia that the Japanese import licensing constituted an import quota in violation of GATT Article XI and that Japan had nullified and impaired benefits accruing to the United States under GATT in violation of Article XXIII.²³⁵ Australia, the European Communities, India, New Zealand and Pakistan all joined the U.S. complaint against Japan as exporters of leather to Japan.²³⁶

The Panel acknowledged that Japan's defense of its leather import restrictions rested almost entirely on the cultural policy of protecting the Dowa, but the Panel concluded that

[T]he special historical, cultural and socio-economic circumstances referred to by Japan could not be taken into account by [the Panel] in this context since [the Panel's] terms of reference were to examine the matter "in the light of the relevant GATT provisions" and these provisions did not provide such a justification for import restrictions.²³⁷

Thus, the Panel recommended that Japan end its import quotas.²³⁸

A similar dispute involving Japanese cultural defenses arose in connection with the labeling and taxing of imported wines and spirits.²³⁹ Distilled liquors were classified as shochu, whiskey (including brandy), or spirits (including vodka, gin and rum).²⁴⁰ For each class, different excise tax rates applied.²⁴¹ The European Communities claimed that the differential tax system discriminated against imported liquor in violation of the national treatment requirement of GATT Article III.²⁴² In essence, the excise tax categories were designed to impose lower taxes on traditional Japanese drinks like sake, mirin, and shochu, despite their similarity in content and production to European spirits.²⁴³ Japan contended that these traditional Japanese alcoholic beverages were not "like" or "directly competitive" with European distilled spirits.²⁴⁴ In determining whether a product is "like" or "directly competitive," Japan argued that the Panel must consider qualities including the image, consumption, end-use, and price, as well as physical properties, such as

235. *See id.* ¶ 15.

236. *See id.* ¶ 38.

237. *Id.* ¶ 44.

238. *See id.* ¶ 59.

239. *See* Japan Alcohol Panel Report, *supra* note 174, ¶ 1.1.

240. *See id.* ¶ 2.3.

241. *See id.*

242. *See id.* ¶ 3.1. The European Communities also complained that the wines and alcoholic beverages imported from Europe to Japan were not adequately protected by Japan against infringement of trade names. *See id.*

243. *See id.* ¶ 3.2.

244. *See id.* ¶ 3.10.

alcoholic content.²⁴⁵ The Panel acknowledged the significance of different patterns of consumption in judging the likeness of two products.²⁴⁶ However, the Panel rejected the argument that a traditional domestic product like shochu can be differentiated from an imported product like vodka:

Since consumer habits are variable in time and space and the aim of Article III: 2 of ensuring neutrality of internal taxation as regards competition between imported and domestic like products could not be achieved if differential taxes could be used to crystallize consumer preferences for traditional domestic products, the Panel found that the traditional Japanese consumer habits with regard to shochu provided no reason for not considering vodka to be a “like” product.²⁴⁷

In the Panel’s view “‘like’ products do not become ‘unlike’ merely because of differences in local consumer traditions within a country . . .”²⁴⁸ The Panel rejected the cultural claim of Japan and recommended that the tax differentials be eliminated.²⁴⁹

These three panel decisions, Canadian periodicals, Japanese leather goods, and Japanese alcoholic beverages, collectively demonstrate the international community’s deep skepticism toward claims of cultural exception with regard to the norm of open trade. What apparently underlies each of these cases is an implicit judgment that the “true” intent or motive of the importing state is to protect their economic, as opposed to cultural interests. Moreover, the panels uniformly have rejected the argument that a cultural or traditional component may distinguish otherwise like or directly competitive goods.

F. Conclusion

There is no cultural exception to the GATT. Unlike the norm of gender equality, the norm of nondiscriminatory open trade is not subordinated to cultural concerns. We might try to explain this inconsistency by arguing that the trade norm is stronger than the norm of gender equality. There is a wide consensus among states that nondiscriminatory open trade maximizes wealth; trade must be governed by rational economic forces unencumbered by irrational influences like culture. It is

245. *See id.* ¶ 3.12.

246. *See id.* ¶ 5.6.

247. *See id.* ¶ 5.7.

248. *See id.* ¶ 5.9(b).

249. *See id.* ¶ 5.17. The W.T.O. Appellate Body affirmed the conclusions in the Panel Report. *See Report of Appellate Body in Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, AB-1996-2 (adopted October 4, 1996).

tempting to draw the conclusion that cultural concerns are subordinated to economic interest.

This hypothesis, however, cannot explain why most other international legal norms, including norms that protect non-economic interests, also trump culture. We have seen that culture does not trump other human rights norms, like the prohibition against slavery. Indeed, cultural exceptions to international trade norms fail precisely because they are regarded as tainted by economic interest. Far from strengthening legal claims, economic interest undermines the legal arguments of states claiming cultural exceptions. In part IV below we will see that non-economic interests in upholding international environmental norms also trump cultural exceptions.

IV. CULTURAL EXCEPTIONS TO INTERNATIONAL ENVIRONMENTAL NORMS

A. Introduction

International environmental issues often raise cultural exceptions. Questions about the relative priority to accord different human activities affecting the environment, plants, or animals necessarily implicate cultural practices. If logging threatens the spotted owl, then a moratorium on logging will affect how loggers, their families, and communities live. In the international arena, the cultural issue is compounded by the differences in nationality and the close connection between culture and sovereignty.

The 1973 Convention on International Trade in Endangered Species (CITES) has led to a number of disputes between cultural practices and international environmental norms.²⁵⁰ CITES imposed restrictions on the import and export of certain flora and fauna contained in one of three categories of threatened or endangered species.²⁵¹ The most stringent restrictions were imposed on species threatened with extinction, which were contained in Appendix I of the treaty.²⁵² Among these species were the African elephant, most species of rhinoceros, and certain tigers.

CITES restrictions on trade in elephant, rhinoceros, and tiger parts contradict deeply held cultural beliefs in many Asian societies.²⁵³ Products from the parts of elephants, rhinoceros, and tigers are greatly

250. Convention on the International Trade in Endangered Species of Wild Fauna and Flora, Mar. 6, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

251. *Id.* at art. II.

252. *See id.* at art. II(1).

253. *See* Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1 (1990).

valued for a variety of cultural uses.²⁵⁴ As the market has bid up the price for these animal products, the numbers of these species have dwindled. Elephant tusks, for example, are carved for a number of traditional decorative objects, including jewelry, knives, and piano keys.²⁵⁵ Many Asian cultures, especially the Chinese and Korean, have developed folklore and mythology around the power of the Asiatic tiger.²⁵⁶ Some Asian nations believe that tiger parts have medicinal value for curing laziness, tuberculosis, rabies, asthma, liver disorders, fever, ulcers, rheumatism, heart disease, and epilepsy, among other diseases.²⁵⁷ These medical practices originated more than 3,000 years ago, and some Asians consider this use of tiger parts to be deeply rooted in their national culture.²⁵⁸ Some Asian cultures also value the rhinoceros horn, which can be ground into a medicinal powder. These cultures believe that the horn can cure high blood pressure, impotence, paralysis, influenza, fever, rashes, insomnia, and eye diseases among other illnesses.²⁵⁹ Asian cultures also attribute healing power to the meat, bones, penis and blood of the rhinoceros.²⁶⁰

Despite the overwhelming evidence of ancient cultural practices, trade in these animal products is almost universally outlawed, and most Asian and African countries have laws implementing CITES.²⁶¹ CITES contain no cultural exception, and to a surprising degree, even the Governments of China, Japan, Korea, and Taiwan, where the cultural uses are most prevalent, have not insisted upon a cultural exception to CITES. Other examples discussed below confirm that in general the international community does not respect claims by states for cultural exceptions from international environmental norms.

254. *See id.*

255. *See id.* at 3.

256. *See* Joonmoo Lee, *Poachers, Tigers and Bears . . . Oh My! Asia's Illegal Wildlife Trade*, 16 NW. J. INT. L. & BUS. 497, 498 (1996). According to Korean mythology, the Korean peninsula was formed by the union of a tiger and a bear. *See id.* at 511.

257. *See* Charlene D. Daniel, *Evaluating U.S. Endangered Species Legislation—The Endangered Species Act as an International Example: Can this be Pulled Off? The Case of the Rhinoceros and Tiger*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 683, 698–99 (1999).

258. *See* Lee, *supra* note 256, at 500.

259. *See* Daniel, *supra* note 257, at 701.

260. *See id.* at 701–02.

261. *See generally*, Daniel, *supra* note 257; Glennon, *supra* note 253; Catharine L. Krieps, *Sustainable Use of Endangered Species Under CITES: Is it a Sustainable Alternative?*, 17 U. PA. J. INT'L ECON. L. 461 (1996); Dianne M. Kueck, *Using International Political Agreements to Protect Endangered Species: A Proposed Model*, 2 U. CHI. L. SCH. ROUNDTABLE 345 (1995); Lee, *supra* note 256; Amy E. Vulpio, *From the Forests of Asia to the Pharmacies of New York City: Searching for a Safe Haven for Rhinos and Tigers*, 11 GEO. INT'L ENVTL. L. REV. 463 (1999).

B. Japanese and Norwegian Whaling

One prominent example of a cultural dispute over endangered species concerns whaling. Over the last four centuries whaling has reduced the population of one sub-species of whale after another to the point where many sub-species are now endangered.²⁶² Britain, France, Germany, Japan, the United States, and Russia have all contributed to the depletion of whale stocks,²⁶³ but during the last century, the leading whaling nation has been Norway.²⁶⁴ With the introduction of the harpoon and the steamship in the late nineteenth century, the Norwegians began killing blue and humpback whales throughout the North Atlantic.²⁶⁵ Norway built larger and faster ships capable of chasing whales far out to sea and processing the whale carcasses on board.²⁶⁶ When the Norwegians had exhausted the stocks of the North Atlantic, they moved to the Southern Hemisphere.²⁶⁷ As technology improved, the whaling industry grew. By the 1940's Norwegian whalers were killing upwards of 50,000 whales annually.²⁶⁸ After an interruption caused by the Second World War, Japan and the Soviet Union joined Norway as the three leading whaling nations.²⁶⁹

As early as the 1930's, the international community recognized that the expansion of whaling threatened to extinguish whale stocks. In 1931, the United States and 25 other whaling nations signed a Convention for the Regulation of Whaling.²⁷⁰ That Convention was superseded in 1937 by the Agreement for the Regulation of Whaling.²⁷¹ In 1946,

262. In the 1600's the growth of whaling in Europe nearly exterminated the North Atlantic right whale. In the 1700's British, French and German whalers around Greenland destroyed stocks of Greenland bowhead whales and Biscayan right whales. The expansion of the U.S. whaling fleet in the 1800's eliminated much of the whale stocks on both the east and west coasts. U.S. whalers moved their operations to South America and Australia. Whaling in the United States largely ended by the turn of the century, while commercial whaling in Norway and Japan was taking off. See Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 28-29 (1991).

263. For an excellent history of the impact of these industrialized countries on the depletion of whale stocks, see Harry N. Scheiber, *Historical Memory, Cultural Claims and Environmental Ethics*, in THE LAW OF THE SEA, 127-66 (H.N. Scheiber (ed), Kluwer 2000).

264. See Cliff M. Stein, *Whales Swim for Their Lives as Captain Ahab Returns in a Norwegian Uniform: An Analysis of Norway's Decision to Resume Commercial Whaling*, 8 TEMP. INT'L & COMP. L.J. 155, 159 (1994).

265. See *id.* at 160.

266. See *id.*

267. See *id.* at 161.

268. See *id.* at 162.

269. See *id.* at 163.

270. See Convention for the Regulation of Whaling, Sept. 24, 1931, 49 Stat. 3079, 155 L.N.T.S. 349.

271. See Agreement for the Regulation of Whaling, June 8, 1937, 52 Stat. 1460, 190 L.N.T.S. 79.

fifteen states, including the United States and Norway, signed the International Convention for the Regulation of Whaling (I.C.R.W.) for the purpose of protecting whale populations from excessive whaling.²⁷² The Convention, which came into effect in 1948, established the International Whaling Commission ("I.W.C.") to regulate whaling.²⁷³ The I.W.C. consists of one representative from each member state.²⁷⁴ The primary responsibility of the I.W.C. is to promulgate a schedule that restricts whaling. In 1982, at the urging of Britain, France, the Netherlands, and the Seychelles, the I.W.C. adopted a moratorium on whaling. Japan, Peru, Norway, Iceland, and the Soviet Union opposed the ban, which passed with overwhelming support.²⁷⁵ The I.C.R.W. provided that any government that files a timely objection to an amendment to the whaling schedule is exempted from the amendment.²⁷⁶ Norway, Japan, and the Soviet Union all objected to the moratorium and were therefore not legally bound by it. In addition, the I.C.R.W. provided that notwithstanding any restriction on whaling, a party could authorize its nationals to engage in whaling for the purposes of "scientific research" subject to limits imposed by the state party.²⁷⁷

Since then, each year the pro-whaling countries have disregarded the moratorium while fighting unsuccessfully to overturn it within the I.W.C. In 1987, Japan announced its intention to conduct scientific research on 300 minke whales. Since then Japan has killed more than 3,000 minke for "scientific research."²⁷⁸ Environmentalists have questioned Japan's motives.²⁷⁹ Environmental groups point out that the number of whales Japan has hunted for scientific research is nearly as many as the pre-moratorium quota. The same Japanese ships are used for scientific research as were used for commercial whaling, and whale meat is still available at high prices in Japanese stores.²⁸⁰ The Japanese have not been able to explain convincingly why their "research" re-

272. See International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 [hereinafter I.C.R.W.].

273. See *id.* at Preamble.

274. See Lawrence Watters and Connie Dugger, *The Hunt for Gray Whales: The Dilemma of Native American Treaty Rights and the International Moratorium on Whaling*, 22 COLUM. J. ENVTL. L. 319, 327 (1997).

275. See *Thirty-fourth Report of the International Whaling Commission*, IWC, 34th mtg. (1982).

276. See I.C.R.W., *supra* note 272, at art. V.

277. See *id.* at art. VIII.

278. See William C. Burns, *The International Whaling Commission and the Future of Cetaceans: Problems and Prospects*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 31, 47-49 (1997).

279. See Kiyoshi Aihara & Yomiuri Shimbun, *Japan Criticized for Scientific Whaling*, THE DAILY YOMIURI, Mar. 10, 1995, at 13.

280. Cynthia Taliaferro Bright, *The Future of the International Whaling Commission: Can We Save the Whales?*, 5 GEO. INT'L ENVTL. L. REV. 815, 824-25 (1993).

quires killing 300 minke annually.²⁸¹ Japan's scientific claim cannot be taken seriously.

Iceland and Norway also submitted research proposals and continued whaling. Iceland withdrew from the I.W.C. in 1992 and has refused to comply with the moratorium.²⁸² Norway briefly ceased whaling in 1991, but in 1993 Norway declared that it would resume whaling of North Atlantic minke whales.²⁸³ Norway cited scientific reports that indicated that the numbers of minke had increased to the point where they were no longer endangered by limited hunting. In 1995 and 1996 the I.W.C. called on Norway to halt all whaling activities and expressed concern that Norway was secretly selling whale meat to other countries.²⁸⁴

The United States, other member states of the I.W.C., and environmentalists worldwide have applied intense diplomatic and political pressure to compel Norway and Japan to cease whaling. Fifteen states have approved a resolution condemning Norway,²⁸⁵ European consumers have boycotted Norwegian imports,²⁸⁶ and the United States has threatened economic sanctions against Norway.²⁸⁷ Under the Pelly Amendment to the 1967 Fishermen's Protective Act, the President had 60 days to decide if economic sanctions were appropriate against a country that has acted to "diminish the effectiveness of an international fishery conservation program."²⁸⁸ Although President Clinton decided not to take action against Norway, he warned that Norway's actions were serious enough to justify sanctions and stated that he hoped that by delaying sanctions, Norway could be persuaded to stop whaling.²⁸⁹ In addition, under the Packwood-Magnuson Amendment to the 1976 Fishery Conservation Act,²⁹⁰ the President was required to reduce the allocation of fish within the U.S. economic zone to any foreign state that

281. *See id.* at 825–26. *See also* D'Amato & Chopra, *supra* 262, at 54–56.

282. *See* Burns, *supra* note 278, at 50.

283. *See id.* at 51.

284. *See id.* at 153.

285. *See President Clinton Delays Whaling Sanctions on Norway*, INT'L TRADE REP. (BNA), at 1678 (Oct. 6, 1993).

286. *See Boycott of Norwegian Fish Products Starts in Australia*, AGENCE FRANCE PRESSE, Aug. 16, 1993.

287. *See America Considering Import Ban in Norwegian Whaling Protest*, Press Association, Newsfile, Aug. 7 1993, available at LEXIS, News.

288. *See* The Pelly Amendment, 22 U.S.C. § 1978 (1988).

289. *See President's Message to Congress on Whaling Activities of Norway*, 29 WEEKLY COMP. PRES. DOC. 2000 (Oct. 4, 1993).

290. *See* The Packwood-Magnuson Amendment of 1979, 16 U.S.C. § 1812(e)(2) (1988).

contravened the international ban on whaling.²⁹¹ Non-governmental organizations have organized boycotts against Norway that have cost Norway almost \$60 million as of 1993, according to some sources.²⁹² Further pressure has been applied by Greenpeace, which has repeatedly interfered with whaling operations.²⁹³

Despite worldwide condemnation, economic sanctions, and diplomatic pressure, Norway and Japan have continued commercial whaling operations at approximately the same rate as before the worldwide moratorium.²⁹⁴ Since 1986, more than 18,000 whales have been killed.²⁹⁵ While Japan and Norway are not technically violating the Convention, they are clearly contravening the spirit of the I.C.R.W. Arguably, the willingness of other whaling nations to submit to the I.W.C.'s regulations, and the overwhelming international public support for a whaling ban, have established a generalized norm (not quite customary law) that disfavors whaling. In response, the Japanese and Norwegians have felt compelled to defend their position as if they were arguing for a cultural exception from a legal norm.

There are two kinds of arguments supporting the whaling moratorium. First, the anti-whaling nations claim that whaling stocks are dangerously low, and certain whales, particularly minke in the North Atlantic, are endangered. In fact, there is a legitimate scientific dispute as to whether minke whales in the North Atlantic remain scarce. Some whaling countries have insisted that minke whales are neither endangered nor threatened based upon the I.W.C.'s own data.²⁹⁶ The estimates of whale populations and growth are unreliable,²⁹⁷ and data is difficult to

291. In actuality no sanctions were applied under Packwood-Magnuson. See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (interpreting the amendment to allow the Secretary of Commerce to use his discretion in certifying sanctions against a foreign state). No fishing limits have been imposed against either Japan or Norway.

292. See *Boycott of Norwegian Fish Products Starts in Australia*, AGENCE FRANCE PRESSE, Aug. 16, 1993; *Economic Sanctions Needed to Halt Norwegian Whaling*, *Environmentalists Say*, INT'L ENVTL. REP. (BNA), (Nov. 19, 1992); Howton, *supra* note 3, at 191-92.

293. See Stein, *supra* note 264, at 180-83.

294. See *On the Menu?: A Compromise for Whales*, THE ECONOMIST, Oct. 25, 1997, at 48 [hereinafter "On the Menu"].

295. See *Ban Divides Whaling Commission*, AP ONLINE, May 19, 1998.

296. Dylan A. MacLeod, *International Consequences of Norway's Decision to Allow the Resumption of Limited Commercial Whaling*, 6-SPG Int'l Legal Persp. 131, 132 (1994). There is an argument that the whaling moratorium is based on poor scientific evidence. See William Aron, William Burke and Milton Freeman, *Flouting the Convention*, ATLANTIC MONTHLY, May 1999.

297. See Burns, *supra* note 278, at 54-64. Estimates of whales are based upon very rough data. Only a small number of species are actually counted, and such counts are often inaccurate. Survey methodologies assume a relatively equal distribution of whales and do not take into account the possibility that there may be unusual concentrations of whales at

interpret because the gender and age of the whales is not obvious even after the whales are captured.²⁹⁸ Whaling States point to a 1991 report by the Scientific Committee of the I.W.C., which estimated that there are about 87,000 minke in the northeast Atlantic, 760,000 in the Antarctic, and 25,000 in the North Pacific.²⁹⁹ The Norwegians have claimed that they could hunt 2,000 minke annually without depleting the population; Norwegian fleets hunt only about 1,000 minke whales annually.³⁰⁰

Second, leaving aside the question whether these whales are in fact endangered, the United States and other countries have opposed whaling in part for cultural and humanitarian reasons.³⁰¹ For example, the late U.S. Commerce Secretary Ronald Brown dismissed scientific evidence that there were sufficient whale stocks to sustain hunting. He argued that "scientific advice, while essential, is not the only factor which should be considered in managing resources. Other factors, such as cultural traditions, are also important."³⁰² Many environmentalists and philosophers have argued that whales are highly intelligent creatures and that it is immoral to destroy another highly intelligent mammal. In the memorable words of one environmentalist:³⁰³

To look upon commercial whaling with approval seems to be like looking with approval on a hoard of cunning but illiterate

certain times and places. Moreover, the most common method, transect surveying, assumes that the whales are stationary and that all whales along the trackline are detected. Neither of these assumptions is generally accurate. Estimates may be as much as 50% above or below the actual number of whales as a result of these inaccuracies. *See id.*

298. The pro-whaling countries insist that the I.W.C. should rely solely on scientific estimates of whale populations. Some argue that continuing to protect whale populations may create an ecological imbalance. *See* Mark Derr, *To Whale or Not to Whale*, ATLANTIC MONTHLY, Oct. 1997. This conflict has threatened the legitimacy of the I.W.C. *See generally* David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 AM. J. INT'L L. 154 (1995).

299. 41st Report of the International Whaling Commission, at 64 (1991); *See also* Burns, *supra* note 278, at 50.

300. Suvendrini Kakuchi, *Tokyo Persists with Bid to Lift Whaling Ban*, Inter Press Service online Nov. 13, 1997.

301. *See* Scheiber, *supra* note 263, at 139-42.

302. Bruce Fein, *Minke Endangering Free Trade?*, THE WASHINGTON POST, Mar. 15, 1995, at A18.

303. *See* J. Baird Callicott, *Whaling in Sand County: A Dialectical Hunt for Land Ethical Answers to Questions About the Morality of Norwegian Minke Whale Catching*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 1, 22-25 (1997). Rep. Gerry Studds introduced a resolution opposing commercial whaling, which passed the House in February 1993. H.R. Con. Res. 34, 103d Cong. (1993). Rep. Studds defended the resolution, arguing, "commercial whaling is an anachronism. No other group of animals has so captured the imagination of the American people . . . yet, no other group of animals has been subject to such relentless hunting for profit. Commercial whaling must be stopped." 139 Cong. Rec. E270 (daily ed. Feb. 3, 1993)(Statement of Rep. Studds).

vandals looting and plundering the art galleries and libraries of an ancient and peaceful civilization in the name of gathering fuel for cooking fires.³⁰⁴

This moral position is defended by some scientists based on physical and behavioral evidence. According to some scientists, the whale's brain is about six-times larger and more powerful than the human brain.³⁰⁵ There is controverted evidence that whales have a sophisticated language that appears to include "abstruse mathematical poetry,"³⁰⁶ a sense of humor, an ability to communicate with other species, such as dolphins, and highly evolved communities.³⁰⁷ For these reasons, some argue that whales should be considered sentient moral beings entitled to humanitarian protection under international law.³⁰⁸ Some environmentalists argue that killing whales is morally equivalent to genocide.³⁰⁹

Norway rejects the argument that whales are more highly evolved mammals. Norwegian officials negate scientific arguments about the intelligence and social instincts of whales and compare whaling to slaughtering cows.³¹⁰ Just as Indians view cows as sacred, the United States and other anti-whaling countries are attributing to whales characteristics that reflect cultural values. By characterizing this debate as a clash of two cultural values, Norway and Japan hope to weaken the legitimacy of the norm disfavoring whaling.

Norway and Japan view whaling as an essential aspect of their national culture dating back centuries. They advance three kinds of arguments in defense of whaling. First, both governments argue that if whaling ceased small whaling communities, which have survived generations, would be displaced and a traditional way of life would be

304. See Callicott, *supra* note 303, at 25.

305. See D'Amato and Chopra, *supra* note 262, at 21.

306. See *id.* at 21.

307. See *id.* at 22 (citing J. LILLY, *THE MIND OF THE DOLPHIN: A NONHUMAN INTELLIGENCE* (1967) and BUNNELL, *THE EVOLUTION OF CETACEAN INTELLIGENCE, IN MIND IN THE WATERS* 52 (J. McIntyre ed. 1974)).

308. See *id.* at 61.

309. See David Andrew Price, *Save the Whalers*, *THE AMERICAN SPECTATOR*, Feb. 1995, at 32. In an open letter to the Norwegian people in 1993, Sea Shepherd President Paul Watson wrote, "The whales will talk about you in the same vein as Jews now talk of Nazis. For in the eyes of whalekind, there is little difference between the behavior of the monsters of the Reich and the monsters behind the harpoon." *Id.* at 34. Arguments that whales are exceptional are strongly disputed. See, e.g., Aron et al., *supra* note 296.

310. See Howton, *supra* note 3, at 180. "You treat whales like the Indians treat cows—as if they are sacred—the Norwegians tell their critics. For they believe that there is nothing god-like about the whale . . . why should they be treated in any way different from fish?" Elizabeth Buie, *Why the Whale is in Deep Trouble*, *THE HERALD (GLASGOW)*, Feb. 11, 1995, at 16.

lost.³¹¹ In Japan, for example, only four whaling villages remain after many centuries of whale hunting. Within these coastal villages, highly specialized workers use every part of the whale carcass for food products, insecticide, fertilizer, tools, and leather.³¹² In Norway, there are about 150 families remaining that have been whaling for many generations.³¹³ If whaling ceased, the whalers, their families, and other industries that support whaling would be affected.

This first set of cultural arguments for protecting whaling communities parallels the claim raised by the Japanese Government on behalf of the Dowa leather workers discussed in part III.³¹⁴ In both cases, an insular community with a traditional way of life is threatened by foreign influence. What distinguishes these two examples is their relative power. The Dowa are disadvantaged by immutable characteristics that have subjected them to discrimination for centuries in Japanese society.³¹⁵ The Japanese regard leather working as a dirty occupation. The Dowa probably do not seek to preserve their traditional subordinate position in Japan. The Dowa probably would prefer to pursue other professions, if they had the choice. In contrast, Japanese and Norwegian whalers are not defined by an immutable characteristic and suffer no particular discrimination or disadvantage. Indeed, they enjoy a special status as cultural icons. They have chosen their profession and find satisfaction in preserving their heritage. It is unclear whether the Dowa cultural claim is stronger because it is morally justified to protect a disadvantaged group, or whether the whaler's cultural claim is stronger because it is genuinely intended to protect a valued and historic aspect of the national heritage. In any event, the international community has rejected both cultural claims as inauthentic.

Second, Japan and Norway claim that whaling is an historical link to their seafaring past. In this regard, whaling should be preserved not merely to maintain a small insular community, but more importantly, to preserve a part of the nation's heritage. Americans are familiar with this cultural argument. Americans prize the idea of the family farm as a reminder of our agrarian origins. We protect farmers in part because we

311. See Scheiber, *supra* note 263, at 147.

312. Milton M.R. Freeman, A Review of Documents on Small-Type Whaling, Submitted to the International Whaling Commission by the Government of Japan, 1986-95, I.W.C. Workshop on Japanese Community-based Whaling, March 18-21, 1997; MASAMI IWASAKI-GOODMAN AND MILTON M.R. FREEMAN, SOCIAL AND CULTURAL SIGNIFICANCE OF WHALING IN CONTEMPORARY JAPAN: A CASE STUDY OF SMALL-TYPE COASTAL WHALING IN KEY ISSUES IN HUNTER-GATHERER RESEARCH, 377, 377-391 (Ernest S. Burch, Jr. and Linda J. Ellanna eds., 1994).

313. See *On the Menu?*, *supra* note 294.

314. See *supra* notes 233-38 and accompanying text.

315. See *supra* note 234 and accompanying text.

believe that farming represents something virtuous in our nation's traditions. It does not seem to matter that less than three percent of Americans farm, or that the mythology of the family farm bears little resemblance to the reality of modern agri-business. Nevertheless, such myths often contribute to a sense of national identity. Similarly, the continuation of whaling is a living reminder of a simpler time and the sea's influence on shaping the Norwegian or Japanese national experience.

Of course, whaling in the 1990's does not look anything like whaling in the eighteenth century. The industry has become more capital-intensive utilizing modern ships, advanced harpoons, and on-board factories to process the whale carcass more efficiently than traditional techniques. Still, the majority of Japanese and Norwegians who do not whale treasure some distant idealized memory of what whaling once was. The mythology of whaling, especially for Norwegians, is a source of national pride.³¹⁶

Third, Japan and Norway assert that whale meat is itself an important aspect of their respective cultures. In both countries whale meat is considered a special delicacy eaten on holidays and given as gifts.³¹⁷ Eating whale meat is more than a dietary preference in Japan. It also reflects the emotional and cultural significance that the Japanese attribute to special occasions.³¹⁸ Japanese exchange whale meat as part of the ritual of special events and holidays, particularly at weddings, local festivals, and new years. The Japanese typically prepare special ceremonial dishes for each of these occasions.³¹⁹ The Japanese also insist that they use every part of the whale. For example, the baleens of right whales are used to make puppets for Japan's traditional puppet theater, "Bunraku."³²⁰ Similarly, for Norwegians a ban on whale meat would be analogous to a ban on turkey at Thanksgiving.³²¹ Whale meat is a central feature of Christmas and New Years feasts in Norway. Whaling countries de-

316. See Callicott, *supra* note 303, at 2.

317. See Kakuchi, *supra* note 300. The Japanese taste for whale meat is relatively recent. Until World War II whale meat was not an important food source. During the postwar period, when other forms of protein were scarce, the Japanese relied on whale meat for primary school lunches. The postwar generation of Japanese thus grew up with a strong taste for whale meat. While whale meat was largely distributed through the informal economy as gifts in traditional Japan, today whale meat sells for about \$40 per kilogram.

318. See Sumi, *supra* note 4, at 318.

319. See IWASAKI-GOODMAN, *supra* note 312, at 385-87.

320. See Sumi, *supra* note 4, at 341.

321. "When you criticize the food people eat, that's an attack on culture." Arne Kaland, University of Oslo anthropologist as quoted by Walter Gibbs, *Why Norway Puts Whale on Menu: The Season which Ended July 31, Yielded a Record Harvest, Defying World Ban.*, CHRISTIAN SCIENCE MONITOR, Aug. 11, 1997, 1997 WL 2803107.

nounce U.S. "cultural imperialism" for telling them not to eat whale meat.³²²

Like the Canadian case discussed in part III, the whaling debate pits a soft international norm against a soft cultural exception. The Norwegians and the Japanese, like the Canadians, want to preserve certain distinguishing cultural features that they believe strengthen national identity. The United States and most of the international community regard the cultural exception for whaling (or magazines) as a transparent disguise for economic protection.

The whaling example differs from the Canadian magazine case in certain key respects. Unlike the Canadian case, the Japanese and Norwegians do not face a competitive importer. The Canadian periodical ban benefited the Canadian magazines at the expense of U.S. magazine competitors. By characterizing Canada's interest as "economic," the GATT Panel ignored the cultural interest Canada asserted. The United States complained to the W.T.O. that Canada had impaired the *economic* benefits the United States had bargained for under the national treatment provision of the GATT. In other words, GATT dispute settlement operated to process the conflicting private economic interests with the result that public free trade norms were reaffirmed.

In contrast, Japan and Norway are not hurting U.S. competitors by continuing to whale. The U.S. opposition to whaling is based on a genuine concern about whales. We could say that the United States has a "pure" (non-economic) motive in seeking to protect whales as opposed to the U.S. interest in opening the Canadian market for Time, Inc. If we then characterize the U.S. motive altruistically, does that weaken or strengthen the U.S. position? Arguably, the United States here is affirming the international legal norm based on a genuine commitment to preserving the global commons. On the other hand, we might question whether the United States really has standing to protect whales. If whaling does not directly hurt the United States economically, the U.S. economic threats against Norway might look like an unjustifiable interference into Norway's domestic affairs.

In short, the private economic interests vindicated in the Canadian case do not exist here. The whaling debate could be described as a conflict between a public interest in protecting the global environment and either Norway's (Japan's) public interest in preserving cultural practices or Norway's (Japan's) private interest in protecting a local industry. To the extent that we characterize Norway's (Japan's) interest as private or

322. See T. R. Reid, *World Whaling Body Riven by Dispute; Norway Threatens to End Moratorium*, WASH. POST, May 15, 1993, at A17; *Japanese Rally for Hunting of Whales*, N.Y. TIMES, Apr. 20, 1993, at C4.

economic, the cultural exception appears less persuasive. By contrast, the U.S. claim against whaling may be more or less persuasive because of the absence of a private or economic interest.

The whaling debate is not merely a conflict between the cultural claims of Japan and Norway and the I.W.C. It may be characterized as a clash of two competing cultural claims. The United States, Europe, and the other anti-whaling countries assert that whales are unlike other mammals that we regularly use as a food source. The idea that whales, like dolphins, are different reflects popular culture. For example, the U.S. film "Free Willy," which featured a whale, was promoted based upon the close relationship between humans and whales. The film's distributor advertised that "[w]hales are majestic, gentle, warm-blooded mammals that mate for life, travel in family groups, feel pain, and are incredibly intelligent."³²³ In other words, whales have good family values. To the extent that Japan and Norway are successful in characterizing the U.S. claim as merely cultural bias, the U.S. claim looks weaker. If the whaling controversy is merely a cultural contest between two different cultural attitudes, the U.S. cultural claim is no stronger than the Norwegian cultural claim.

While the whaling question remains contested, the international community has ostracized Norway and Japan for hunting whales. Both countries have voluntarily limited their quotas of whales and have felt compelled to justify their actions at every opportunity. Other countries are unlikely to begin whaling because of international opposition. We might conclude from this evidence that the international environmental norm disfavoring whaling appears to have trumped the argument for a cultural exception. In fact, the relationship between cultural claims and international environmental norms is subtler than that.

C. Indigenous Nations

States have acknowledged some *de minimis* cultural claims by indigenous tribal nations against international norms protecting endangered species. Whether that practice evidences a cultural exception is not altogether clear. The difficulty of characterizing or defining culture means that sometimes one cannot distinguish a cultural exception from another claim masquerading as a cultural exception. One can debate whether a claim by indigenous tribes for the right to whale derives from cultural, legal, or economic considerations.

323. Mari Skare, *Whaling: A Sustainable Use of Natural Resources or a Violation of Animal Rights?*, 36 ENVIRONMENT 12, 13 (1994) (quoting Warner Bros. Family Entertainment, handout distributed after movie showings in San Francisco, California in 1993).

The I.W.C. authorized member states to petition on behalf of aboriginal groups for an exception from the whaling schedule.³²⁴ Under the so-called "aboriginal subsistence exemption," permission may be granted for a limited number of hunts. The Inuit, of arctic Canada, Alaska, Greenland, and Siberia, for example, have an exemption that permitted them to hunt limited number of gray and bowhead whales. The bowhead has remained an endangered species, but the exemption was granted because the Inuit hunt only for subsistence. The I.W.C. regarded Inuit hunting of bowhead whales as consistent with sustainable development.³²⁵ Some environmental groups like the Sierra Club and the Friends of the Earth did not object to allowing the Inuit to hunt an endangered species of whale. Apparently, these groups deferred out of respect for the rights of indigenous groups.³²⁶ The silence of some environmental watchdogs evidences the strength that the cultural claim can exert. The case of the Makah nation offers a striking comparison to the cultural claims made by Norway and Japan.

The 1,700-member Makah, a Native American tribe in Neah Bay, Washington State, had hunted gray whales for centuries. In 1855 the Makah conveyed certain land to the Federal Government and agreed to relocate to a reservation in exchange for a treaty that acknowledged their right to fish and hunt whales and seals.³²⁷ Commercial whaling exhausted the gray whale population around the turn of the century, and as a result, the Makah ceased whaling more than 75 years ago.³²⁸ The loss of a primary industry hurt the tribal economy.³²⁹ As unemployment and poverty increased, many Makah believed that without whaling the community lacked social cohesion or purpose.³³⁰ Unemployment, crime, substance abuse, and related social problems increased.³³¹ Even after 75 years, the whale remains a central symbol of Makah culture, and its image appears on buildings, ships, and clothing.³³²

324. See Scheiber, *supra* note 263, at 142-44.

325. See D'Amato and Chopra, *supra* note 262, at 57-59.

326. See *id.* at 58.

327. See Treaty of Neah Bay, Jan. 31, 1855 <<http://www.geocities.com/yosemite/7431/treaty.htm>>.

328. See Watters and Dugger, *supra* note 274, at 323.

329. See *id.* at 324.

330. See *id.*

331. See *id.* Unemployment on the Makah reservation ranges from 50-70%. See *id.* Household income averages \$7,000 annually. See *id.* Substance abuse and crime are widespread. See *id.* Some Makah also believe that the loss of whale meat in their daily diet caused malnutrition and related health problems. See *This Was One Expensive Meal: The Aboriginal-Green Alliance Is Shattered By The Makah Whale Hunt*, ALBERTA REPORT, June 14, 1999, at 21-22.

332. See Peggy Andersen, *One Tribal Whale Hunt, Two Opposing Views of it Success*, THE OREGONIAN, May 24, 1999, at E11.

Since the international whaling moratorium, the population of gray whale has increased, and it is no longer listed as an endangered species. As the conditions of the gray whale have improved, some Makah argued that the U.S. Government could not justifiably perpetuate a ban on whaling by the tribe. Other Makah believed that regardless of the environmental circumstances, the tribe should respect the whale and protect it from extinction. Within the tribe this issue was debated fiercely. After the tribal leaders chose to pursue the right to whale, the tribe in 1994 asked the Federal Government for permission to resume whaling under the treaty.³³³

The United States petitioned the I.W.C. to exempt the Makah.³³⁴ Some member states expressed concern that granting the exemption to the Makah, after nearly a century of no whaling, would trigger a landslide of demands from other indigenous groups.³³⁵ For example, 13 other Canadian tribes also sought exemptions.³³⁶ Overcoming these concerns, the Commission granted the exemption to allow the Makah to hunt five California gray whales per year for subsistence and ceremonial purposes. Japan and Norway objected that the I.W.C. was applying a double standard.³³⁷ Other anti-whaling nations supported the exemption for the Makah, even while they opposed a cultural exemption for Japan or Norway.

In 1999, the tribe conducted its first whale hunt. Unlike the Japanese or Norwegian whalers, none of the tribe who participated had any experience of whaling. Few members of the tribe had ever tasted whale meat or remembered any ceremonies connected to whaling.³³⁸ The Makah did not rely on traditional hunting methods in resuming hunting. In order to kill their first whale, the Makah used motorized boats, steel harpoons, and a .50-caliber armor-piercing assault rifle designed to destroy tanks. The cost of this modern technology was underwritten by a \$310,000 grant from the U.S. Commerce Department.³³⁹ Arguably, these facts may suggest that the whale hunt was not authentically traditional. Conversely, it might seem unfair if the I.W.C. had restricted the Makah to using only traditional whaling techniques.

333. See Scheiber, *supra* note 263, at 162.

334. See Watters and Dugger, *supra* note 274, at 332–38.

335. See *id.* at 337.

336. See *id.*

337. See *id.* at 321–22.

338. See Sam Howe Verhovek, *After the Hunt, Bitter Protest and Salty Blubber*, N.Y. TIMES, May 19, 1999, at A14. “It’s not like we have a bunch of favorite recipes to work with,” said [one whaler], “This may be an ancient tradition, but it’s all new to us.” *Id.*

339. See Sam Howe Verhovek, *Reviving Tradition, Tribe Kills a Whale*, N.Y. TIMES, May 18, 1999, at A18.

The Makah celebrated the killing of their first whale as a return to their traditions. The hunter who threw the first harpoon declared that, "This is about a great tradition. It's about calling out to our ancestors. It's all about who we are as a people."³⁴⁰ The hunt "restores a missing link in our heritage," according to one of the tribal leaders. "This is a great day for the Makah Nation," said another. Another tribal member added, "This brings meaning and purpose back to the Makah men. For 70 years, they had what they did best taken away from them."³⁴¹

Why should the Makah's cultural claim be considered more authentic than Japan's or Norway's? In recent years, many indigenous nations have used cultural exceptions effectively in a variety of contexts to protect their interests and expand group rights under international law.³⁴² We might assume that an indigenous tribe has a traditional form of whaling that is more primitive than the modern techniques used by Japan and Norway or that the tribe has practiced whaling continuously for a longer period. However, the strength of the Makah's cultural claim clearly is not a function of authenticity or longevity. All three cultures use whale meat for some ceremonial purposes, but Norway and Japan have had a continuous tradition of eating whale meat.³⁴³ By contrast, the Makah had never tasted whale meat and had no clear idea of what to do with the whale carcass after they killed it.³⁴⁴

A second possible distinction is that the Makah hunting is limited to a sustainable level.³⁴⁵ The Makah will only hunt 20 grey whales over five years, whereas Japan hunts 300 minke annually. This distinction is not entirely persuasive, either. As a percentage of the total whale population, the Japanese quota is half the percentage of the Makah quota, and grey whales are still considerably scarcer than minke.³⁴⁶ Moreover, as

340. Verhovek, *supra* note 338, at A14.

341. Verhovek, *supra* note 339, at A18.

342. See generally Engle, *supra* note 9, at 303–310. Whereas state actors have claimed cultural exceptions to justify limiting gender equality under international law, indigenous nations have deployed cultural claims to establish international groups' rights. See *id.* at 294–95, 303–10.

343. See Aron et al., *supra* note 296.

344. See David Osborne, *Whale Gives Indians a Taste of Their Heritage*, THE INDEPENDENT (LONDON), May 19, 1999. The owner of the Makah Maiden Diner told reporters, "I'll make a whale of a burger . . ." Verhovek, *supra* note 338.

345. The I.W.C. established the aboriginal subsistence quota of grey whales at 140 annually, but most of these are hunted by the Russian Chukchi, an Inuit tribe on the Russian coast. Other Inuit tribes have been permitted to hunt bowhead whales, which are still listed on the endangered species list. Thus, granting the Makah the right to hunt 20 whales over five years is consistent with the I.W.C.'s policies toward aboriginal groups. See Watters and Dugger, *supra* note 274 at 335–36.

346. Accepting the figures the I.W.C. has reported, there are 750,000 minke and only 25,000 grey whales. Japan hunts .0004% of the minke annually, and the Makah will hunt .0008 percent of the grey whales over five years.

was discussed above, the whaling ban is only partly a function of the scarcity of whales. Many believe that whales simply should not be killed because of their intellect.³⁴⁷

Third, we cannot distinguish tribal "subsistence" hunting from "commercial" hunting. Obviously, the Makah do not need whale meat to "subsist," since they have lived without it for generations. If subsistence implies that the tribe will use the meat itself and will not resell it, it is unclear what the tribe intends. Some authorities have argued for a broad definition of subsistence that would include selling whale meat to provide financial support for the community.³⁴⁸ The Makah have said that they have no plans to sell whale meat on the Asian market, where a single gray whale is worth up to \$500,000.³⁴⁹ However, the I.W.C. does not prohibit the tribe from selling whale meat, and it is clear that the tribe itself does not have a "taste" for whale. Granted that the tribe has suffered economically, it seems only a matter of time before the Makah begin selling to the Asian market. Indeed, some tribal elders placed a newspaper ad opposing the whale hunt in which they stated "we think the word 'subsistence' is the wrong thing to say when our people haven't used or had whale meat/blubber since the early 1900's. For these reasons, we believe that the hunt is only for the money."³⁵⁰

It is arguable that the Makah's claim is distinguishable based on their treaty rights with the U.S. Government and the sense of responsibility that the United States has for the condition of the Makah.³⁵¹ Article IV of the treaty provides, "The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States . . ."³⁵² Normally, we would read the first sentence to mean that the tribe is entitled to national treatment. In other words, the plain language appears to say that the tribe has the same rights to fish, whale and seal—no more and no less—as U.S. citizens. However, the U.S. Supreme Court has interpreted essentially the same language in another Indian treaty granting fishing rights to mean that even if other U.S. citizens are prohibited from fishing, the tribe may not be denied the right to catch at

347. See *supra* note 300–308 and accompanying text.

348. See Scheiber, *supra* note 263, at 144–45.

349. See Verhovek, *supra* note 339.

350. Watters and Dugger, *supra* note 274, at 332–35 (citing PENINSULA DAILY NEWS, June 16, 1996).

351. In fact, there was considerable opposition to the Makah within Congress. The House Committee on Resources approved a resolution opposing the Makah's petition in order to protect the gray whale. See Press Release, U.S. House of Representatives, Congressional Panel Approves Metcalf Resolution Opposing Gray Whale Hunt (June 26, 1996).

352. Treaty with the Makah Tribe, Jan. 31, 1855, art. IV, 12 Stat. 939.

least some quantity of fish.³⁵³ Assuming that the treaty does guarantee the tribe's right to whale unequivocally, the treaty only binds the United States. The treaty cannot explain why the I.W.C. found the tribal claim more compelling than the claims of Japan or Norway.

International law has only recently recognized the rights of indigenous peoples, and there are no binding international conventions that establish the right of indigenous peoples to hunt.³⁵⁴ There is some evidence of emerging international customary norms protecting the rights and interests of indigenous populations.³⁵⁵ Nevertheless, there is no specific binding international convention that guarantees the rights of indigenous peoples to hunt or fish.³⁵⁶ It is probably too early in the development of this norm to conclude that it supercedes other international environmental norms. However, one might argue that the I.W.C.'s willingness to accept an aboriginal claim, is itself evidence of a norm that privileges some claims of indigenous groups over others.

Likewise, there is a strong ethical argument that the United States is morally bound to protect the rights and interests of indigenous nations. One might argue that the U.S. Government has a moral, if not quite legal, duty to provide restitution to the descendants of the tribal nations it destroyed and oppressed.³⁵⁷ However compelling such a moral claim might be, it can only explain the actions of the U.S. Government in seeking an exception for the Makah, but again, it cannot explain why other governments have concurred.

We might accept the argument that the U.S. Government's request for an exemption for the Makah's whaling was based upon the treaty

353. See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). See generally WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 419-38 (3d ed. 1998).

354. See generally Chris Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993*, 16 HUM. RTS. Q. 1 (1994) (tracing the shifting representation of indigenous peoples from the International Labor Organization's early efforts to protect them to the contemporary U.N. Working Group on Indigenous Populations).

355. International law is developing toward the recognition and protection of the rights and interests of indigenous populations. Examples include the I.L.O. Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989), the General Assembly Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities (1992), and the draft Declaration on the Rights of Indigenous Peoples which was adopted the Working Group on Indigenous Populations of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities and is now before the U.N. Human Rights Commission for adoption. See generally Benedict Kingshury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM.J. INT'L L. 414 (1998).

356. See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996).

357. See generally Scheiber, *supra* note 263, at 163-66.

rights of the Makah, international customary norms, or moral obligations. However, these arguments do not evidence support for a cultural exception to international law. They do suggest possible explanations for why U.S. policymakers regarded the Makah's claim to hunt whales as legally or morally superior to the claims of Norway and Japan.

Perhaps what distinguishes the Makah's claim in the view of the international community is the tribe's economic dependency. The Makah have documented the effect of the whaling ban on their employment and economy. The loss of jobs associated with whaling had a devastating impact on the Makah. By contrast, neither the economies of Norway nor Japan is significantly dependent on whaling.

The Makah may be a more sympathetic claimant for a whaling exemption because the reservation lacks any significant industry. The authenticity of the Makah nation's cultural claim here may be a function of the degree of its economic interest. This analysis, however, would seem to contradict the general observation that cultural claims are disregarded when there is any taint of a disguised economic interest. It is merely because of the relative size of the whaling industry that the Makah have a stronger claim. Even if whaling were a more significant industrial sector in Japan, it is hard to imagine that the degree of Japan's economic interest alone would justify granting an exemption for whaling. What truly distinguishes the Makah is the conjunction of their economic dependence and their aboriginal status.³⁵⁸ The rhetoric of "aboriginal subsistence" transforms an argument about economic self-interest into an assertion of cultural sovereignty.

The prevailing idea of "culture" is itself a product of the relationship between developed industrialized European societies and less developed societies. Often, we use the term "culture" when we are discussing less developed societies, and sometimes we describe these as "primitive" cultures. The idea of the primitive and the idea of culture are closely linked. The use of the term "aboriginal" is also closely related to the term, "primitive." Aboriginal cultures are contrasted with developed or civilized cultures. The I.W.C. granted the Makah an "aboriginal subsistence" exception. Characterizing the Makah whaling culture in this way reinforces the stereotype that the Makah are seen as

358. See generally Scheiber, *supra* note 263, at 153–66. Professor Scheiber argues that the Makah are in fact a victim of the destruction of whale stocks during the nineteenth and twentieth centuries by industrialized countries and the occupation of their lands by Europeans. In his view, the indigenous nations have a stronger moral claim to resume whaling than do the coastal whaling communities of Norway and Japan, which have indirectly shared in the benefits of modernization and industrialization. See *id.* at 164–66.

“primitive.”³⁵⁹ The cultural exception is not a measure then of the respect owed to the tribal nations. Rather, the cultural exception in a sense is a double-edged sword. The use of the cultural exception here bolsters the idea that the tribe is dependent, “primitive”, and subordinate. The status relationship between the Makah and the United States is more a product of U.S. and European cultural stereotyping of tribal nations than it is a function of traditional tribal culture. It is only a cultural exception in the sense that the Makah are culturally excepted from the United States.

This analysis also helps to explain why the Japanese and Norwegian whaling claims have not prevailed against the international environmental norm. Modern industrialized societies like Japan and Norway are not seen as culturally distinctive. Indeed, in the same way that we do not consciously acknowledge an American culture, so, too, we may not see modern economies like Japan and Norway as having a “culture.” At least, we do not use the term “culture” to describe Norway, in the same sense that we use that term to describe indigenous tribes. In sum, the cultural exception in this case reinforces existing power relations between the tribe and the United States.

D. Summary

We saw above that cultural exceptions are effective as against certain international norms protecting women, children, and sexual minorities. The cultural claim proved ineffective as an exception to the free trade norm, however. Instinctively, we may draw the conclusion that economic interests trump the cultural claims. In the environmental context, however, the strong cultural claims of Japan and Norway fail, and they are not trumped by any countervailing economic interest. The I.W.C. is acting not out of an economic interest in whaling, but a genuine (even if culturally biased) concern for protecting whales. Moreover, the *de minimis* exception granted for the Makah is not truly based on the cultural practices of the Makah; rather, it is a balance struck in light of the “aboriginal” status of the tribe between the Makah’s economic needs and the global community’s interest. The Makah case raises a question about when an economic interest, recharacterized as a cultural interest, may trump an international norm.

359. See Tennant, *supra* note 354 at 4–11 (discussing the use of the term “primitive” and showing how legal representations have reinforced the lower status of indigenous groups).

V. THE RELATIONSHIP BETWEEN CULTURE AND THE GENDER EQUALITY NORM

A. Cultural Exceptions Facilitate Globalization

I have mapped out three examples of how public international law manages cultural resistance. This discussion showed that the international community generally characterizes resistance to gender equality as authentically cultural and tolerates cultural exceptions to that international norm. By contrast, the international community generally does not recognize arguments against international trade or environmental norms as authentically cultural (except possibly arguments regarding indigenous nations). As a result, the international community dismisses cultural exceptions to trade and environmental norms. What explains the community's willingness to tolerate cultural exceptions to international gender norms? My hypothesis is that the effectiveness of cultural exceptions in international legal discourse is a function of globalization: the international community does not tolerate cultural exceptions to free trade or environmental norms that obstruct globalization, but it does permit cultural exceptions that facilitate globalization. How then does a cultural exception that permits gender discrimination facilitate globalization?

Today, globalization is dramatically changing our experience of nationality.³⁶⁰ As Americans, we have unlimited access to foreign films, music, and foods. We can enter and leave most countries freely, and the transactional costs of travel and communication are low enough that most Americans can experience foreign cultures directly. The emergence of cultural phenomena like fusion music and cuisine, the world wide web, satellite television, and the spread of English create new cultural forms that are not identified with any one nation.

Even more fundamentally, globalization is changing the nature of sovereignty. As states lower barriers to trade in goods and services, liberalize economic regulations on currency and investment, privatize government-owned industry, and reduce the public sector, states are conceding control over their economies to the international market.³⁶¹ Even the United States Government has only a marginal ability to influence domestic employment, prices, and investment. Exchange rates, foreign demand for U.S. products, shifts in oil production and pricing,

360. See generally THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999).

361. See GREIDER, *supra* note 25, at 227-58.

multinationals, and currency traders may affect jobs, inflation and productivity in the United States as much or more than federal programs.³⁶²

As states lose a sense of their national identity and their economic sovereignty, the power to impose certain social controls becomes one of the chief means of expressing state authority. Neither voters nor politicians believe that our national economic destiny is wholly in our own hands. Social questions, however, can be addressed and controlled at the national level. Our national politics reflect the reality of our diminished control over the economy. Recent elections in the United States have focused attention on social issues like abortion, homosexual rights, and the relationship of church and state. Candidates debate whether the state can require a woman to notify her spouse before she obtains an abortion, deny recognition to a same-sex marriage, prosecute flag burning, post the Ten Commandments in public school classrooms, or outlaw the teaching of evolution. The intensity of these social issues reflects the level of anxiety that Americans feel toward globalization. We respond to the loss of control over our economic destiny by asserting greater control over our schools, neighbors, and social institutions.

The Chilean experience is a good example of the way that globalization triggers cultural resistance to gender equality. Chile is the model for a successful transition from a highly regulated underdeveloped closed economy to a rapid-growth globalized economy. Since Chile removed barriers to trade and investment, it has made impressive strides in re-establishing democracy and protecting civil rights. It has also safeguarded the rights of women to equal employment opportunities. Yet, the influx of foreign trade and capital has corresponded with a fierce cultural backlash against further progress for women in the home. Chile has maintained and even strengthened some of the most restrictive laws in the hemisphere concerning the rights of women to control their reproduction and to obtain a divorce. In international fora, Chile is among

362. Consider for example that in 2000 only 19 percent of the federal budget is spent on all non-military discretionary domestic and foreign programs. Moreover, the total federal budget in 2000, approximately \$1.8 trillion, is roughly equal to the amount of currency traded on world markets in three days. See <www.usbudget.gov>; GREIDER, *supra* note 25, at 245. The central banks of the United States, United Kingdom, Japan, Germany and Switzerland in 1992 held about \$278 billion in foreign-exchange reserves, while the international currency market traded more than twice that amount, \$623 billion daily. See GREIDER, *supra* note 25, at 245. Also, consider the relative size of the gross domestic products of major countries to the capital values of major multinationals. In 1999, for example, the gross domestic products of Spain, Ukraine, Argentina, South Africa, Iran and Thailand were roughly equal to the market capitalization of Microsoft, Merck, Wal-Mart, Lucent Technologies, Cisco Systems and General Electric, respectively. See Gretchen Morgenson, *A Company Worth More than Spain?*, N.Y. TIMES, Dec. 26, 1999.

the most outspoken opponents of gender equality in the domestic sphere.

Throughout the world, globalization challenges sovereignty and triggers widespread cultural anxiety. This anxiety takes many forms. In Europe, parties debate immigration, the rights of minority sub-cultures, and the threat posed by American cultural imports. The rise of anti-immigration parties in France, Belgium, and Austria represent a backlash against the European Union and the free movement of workers. In the former Soviet Union countries and Central and Eastern Europe, the economic displacement caused by liberalization has been catastrophic for many. One response has been the rise of extreme nationalism and anti-Semitism. Globalization and the influx of western culture also triggered the rise of Islamic fundamentalism. Similarly, Hindu nationalism expresses the frustration of Indians toward the global economy. This frustration takes the form of a rejection of western films, television, and music. In all these countries, we witness an intense suspicion towards foreign or global culture, which is viewed as liberal, homogenizing, humanistic, and materialistic. Displaced anxiety to globalization is the root cause of all these efforts to protect local culture from foreign influence.

Cultural exceptions are the legalistic expression of this displaced anxiety to globalization. When states invoke cultural exceptions to bar trade liberalization, they are blocking the forward movement of globalization. The international community rejects efforts to impede globalization. As globalization creates social dislocation and cultural anxieties, there is increased pressure for women to conform to hyper-traditionalized roles as a kind of ballast against social disequilibrium.³⁶³ When cultural exceptions are invoked to reclaim control over social institutions like family and marriage, the international community permits exceptions that facilitate globalization by discharging political pressures against global forces. In this way, cultural exceptions function to facilitate globalization. The cultural exception is an escape valve from the internal political pressure of globalization. The international community recognizes cultural exceptions only to the extent that they relieve displaced anxiety to globalization without obstructing globalization.

When states regulate women (by denying them equal employment opportunities, restricting reproductive rights, denying them certain property rights, child custody or educational opportunities, exposing them to physical violence, including genital cutting, or sexual harass-

363. See Narayan, *supra* note 48, at (1997) (describing how the conflict between modernization and Third World nationalism is often framed as a conflict to protect traditional womanhood from Western colonizing culture).

ment, imposing unwieldy dress requirements, limiting their freedom of movement or their right to marry or divorce), states are reaffirming their sovereignty through social controls without hindering the forward movement of globalization. In these circumstances, the international community defers to the cultural exception. In this way, the international community channels political opposition to market liberalization in a direction that does not pose a risk to globalization.

When states go further by limiting cultural imports, like magazines, film, television or sound recordings, the international community rejects the cultural exception. The W.T.O. does not tolerate cultural exceptions that close markets. The danger is that culture can be so broadly defined that any cultural exception might threaten to swallow the rule of nondiscriminatory open trade.

Similarly, when states claim cultural exceptions against international environmental norms, the international community generally dismisses the cultural claim. The community recognizes that norms protecting the global environment facilitate globalization in two respects. First, these norms maintain conditions that are necessary for conducting business. The depletion of natural resources, the poisoning of the air and water, or the loss of habitable space all endanger economic growth and can thwart foreign investment. If fossil fuel emissions threaten climatic changes that could cause flooding in global financial centers like New York, the restrictions on emissions must be strictly enforced; there is no room for cultural exceptions. The I.W.C.'s moratorium on whaling protects the marine environment that is a major source of food; the international community is not prepared to risk the marine environment to protect Japan's culture.

Second, international environmental norms discourage states from acting unilaterally. Unilateral measures complicate patterns of trade and investment. Where the international community recognizes the need for environmental regulation, globalization is better served by a single global standard rather than 200 national standards. The community allows cultural exceptions to international environmental norms only when there is no risk of environmental damage, and cultural exceptions reaffirm the existing power relations between sovereign states and dependent indigenous tribal nations.

My hypothesis is not the only plausible explanation for why the international community regards cultural exceptions to the norm of gender equality as authentically cultural and legitimate. There are at least three other possible explanations. First, one could argue that the international community distinguishes among possible cultural claims against international norms based upon economic self-interest. In other words, state

actors reject cultural claims that interfere with their economic interest in trade. On the other hand, states are more tolerant of cultural claims against non-economic interests like gender equality. A second related explanation could be that the international community distinguishes between rationality arguments and non-rationality arguments. The community does not tolerate interference in the rationality of the market by non-rationality considerations like culture. The international community considers human rights norms, like gender equality, to be more commensurate with other non-rationality concerns like culture. The community is willing to balance cultural claims against human rights concerns, because neither of them is based upon pure rationality arguments. A third alternative hypothesis is that gender subordination, rather than globalization, explains the willingness of states to tolerate cultural exceptions to gender equality norms. In the next three subsections, I will examine these alternative hypotheses. In my view, each of them may explain an aspect of the relationship between cultural arguments and international legal norms, but none of these three alternatives is sufficient to explain the cultural exception to the gender equality norm.

B. First Alternative Hypothesis: Economic Interests Trump All

My globalization hypothesis might be challenged by arguing that all I have shown is that the international community tolerates cultural resistance to legal norms only when no economic interests are at stake. This hypothesis might explain why international free trade norms trump cultural claims, while cultural claims generally trump non-economic interests like human rights.

There are two problems with this alternative hypothesis. First, non-economic interests are not all subordinated to culture. For example, most human rights norms, like freedom from arbitrary detention, slavery or torture, are not generally subordinated to culture. Our hypothesis must explain why gender norms, as opposed to other non-economic rights, are uniquely subject to cultural exceptions.

Second, this hypothesis fails to account fully for the difficulty of distinguishing between economic interest and culture and neglects the complex relationship between culture and economics. As discussed above, it is nearly impossible to define culture in a way that would clearly exclude economic life. For example, when a state protects an industry by imposing tariffs, it is also protecting the cultural life of the community that depends upon that industry for its livelihood, as was the case of Japan protecting the leather industry. Even if it were possible to define culture as something apart from economic interest, cultural ex-

ceptions and economic interests may favor the same or different outcomes. In international trade, both importing and exporting states have economic interests that may favor or disfavor imports. As we have seen, when a cultural exception favors a domestic industry, the W.T.O. has rejected the cultural exception as a form of disguised protectionism. Rather than strengthening the cultural exception, the appearance of an economic interest raises suspicion that the importing state has a protectionist motive and weakens the legal claim.

Similarly, in international environmental disputes both sides often have economic and non-economic cultural interests at stake. Under the Marine Mammal Protection Act,³⁶⁴ for example, the United States restricted the import of tuna harvested using nets that incidentally killed dolphins. The United States acted with economic, cultural and environmental motives. The U.S. tuna industry lobbied aggressively for the restrictions on imported tuna, which offered significant economic protection to the domestic industry.³⁶⁵ In the absence of any evidence that dolphins are endangered, the United States sought to protect dolphins in part because of a strong cultural affinity for marine mammals. Mexico brought a complaint to the GATT and a GATT panel has declared that the U.S. ban on imported tuna violates GATT by discriminating against foreign products.³⁶⁶ Again, the U.S. economic interest casts suspicion on its environmental and cultural motives, thus weakening the legal defense. Similarly, the opposition to whale hunting is partly based upon evidence that some whale species may be endangered as well as a cultural affinity for whales. Japan and Norway have a strong cultural interest to continue whaling, but their motives are suspect because of their economic interest in protecting domestic whaling.

Economic interests do not nullify all cultural exceptions to environmental norms, however. As we have seen, the international community acknowledged the cultural claim of the Makah to resume whale hunting in part because of the dependency and economic interest of the tribe as well as the moral strength of their claim. While economic interest tainted the cultural claims of Canada in the magazine case or Japan and Norway in the whaling case, economic interest strengthened the cultural claim of the Makah. In sum, cultural exceptions to international norms cannot be

364. Marine Mammal Protection Act Amendments of 1988, 16 U.S.C. §§ 1371(1) & 1378(a)(2) (1994).

365. See generally Richard Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What Can We Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (1999).

366. However, the Contracting Parties to GATT did not adopt the Panel's report as required by the pre-1994 GATT, and therefore, the panel report never became effective. United States—Restrictions on Imports of Tuna from Mexico, 33 I.L.M. 839 (1994).

explained simply by reference to economic interest. There is no clear distinction between economic interest and cultural claims.

C. Second Alternative Hypothesis: The International Community Distinguishes Rationality and Non-rationality Claims

Another possible explanation for why cultural claims against the gender equality norm seem more compelling than cultural claims against the free trade norm is that cultural and economic claims are incommensurable. Economic arguments are based upon verifiable propositions, unlike arguments based upon culture or human rights.

The whole legal structure of the free trade norm rests on a rational economic model.³⁶⁷ When governments grant concessions to foreign imports, they defend the cost to domestic import-competitors by invoking the rationality of free trade. Cultural claims threaten that rationality argument. Cultural claims derive from sentiment, nostalgia, insecurity; they are rooted in non-rationality. To protect the rationality of the market from the non-rationality of nationalism and culture, the international community rejects cultural exceptions.³⁶⁸

A similar relationship between rationality and non-rationality shapes the discourse of environmental law. Environmental claims are strongest when they are based on scientific data. The stronger the scientific evidence that whales or sea turtles are endangered, the stronger the norm that protects them from extinction. The I.W.C. moratorium on whale hunting is supported by sufficient scientific evidence so that it appears more rational than the appeal of the Norwegians and Japanese to their cultural heritage. Again, the rationality of science must be protected from the non-rationality of culture.

Human rights, like culture, fall into the domain of non-rationality. International human rights norms derive from the consent and practice of states.³⁶⁹ In other words, as positivist jurisprudence has displaced natural law, state power has displaced reason as the source of human rights. International human rights norms flow from the consent of states; they do not precede states, and they are not pre-political. When coun-

367. But see Joel R. Paul, *Free Trade, Regulatory Competition and the Autonomous Market Fallacy*, 1 COLUM. J. EUR. L. 29, 33-38 (1994) (showing how GATT promotes economic rationality resting on a false presumption that markets set a "normal price" without government interference).

368. I use the terms "rationality" and "non-rationality" to connote that these concerns are not subject to scientific proof in the same way that economic or environmental concerns may be provable. I am not suggesting, of course, that arguments for human rights are irrational or non-rational.

369. See J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 49-55 (6th ed. 1963).

tries challenge the rights of women or sexual minorities based on religious or cultural grounds, they are invoking the non-rationality of faith or culture. Women's rights are susceptible to cultural arguments because both human rights and culture fall outside the realm of rational logic or science.

The relationship between rational and non-rational claims may partly explain why trade and environmental norms are strong, but it does not fully explain why gender equality norms are weaker than other human rights norms, or why cultural exceptions, which are no more rational than human rights norms, trump gender equality. Culture may be non-rational, but it is not irrelevant. Culture serves an important function in the global system, and understanding the function of culture and its relation to sovereignty may explain the relative strength and weakness of different international legal norms.

D. Third Alternative Hypothesis: Gender Subordination

Another explanation for the disparate treatment of culture might be that the subordination of women's equality to cultural circumstances is a product of gender subordination rather than globalization. There is substantial evidence that international law reproduces gender stereotypes, and traditionally, the scope of international law excludes the concerns of women and gender equality.³⁷⁰ Arguably, by allowing state actors to claim that a norm of gender equality conflicts with a male-dominated culture, public international law promotes gender hierarchy. This explanation draws a dichotomy between globalization and gender subordination that makes little sense, because globalization both reflects and reinforces gender subordination.

Globalization represents a set of assumptions about how to organize a market economy, and our image of a market economy, in turn, rests in part on certain suppositions about gender roles and norms.³⁷¹ Often, these suppositions are so common that they become invisible. In broad terms,

370. See, e.g., Charlesworth et al., *supra* note 42 (international law is structurally biased against women); Hilary Charlesworth, *Alienating Oscar?*, in RECONCEIVING REALITY 1-60 (Dorinda G. Dallmeyer, ed., 1993).

371. See, e.g., WILLIAMS, *supra* note 44, at 64-141 (2000). For example, Professor Williams points out that we provide greater economic rewards and career opportunities to full-time workers than to part-time workers. Our idea of a full-time worker assumes that the worker has no household or child-rearing responsibilities, and thus, the ideal worker is male. *Id.* at 20-30. See also Nancy Fraser & Linda Gordon, *A Genealogy of Dependency*, 19 SIGNS 309 (Winter 1994) (showing how the concept of welfare dependency in the United States rests on assumptions about gender and race subordination implicit in a postindustrial market economy that prizes individualism); ALICE KESSLER-HARRIS, *A WOMAN'S WAGE* 113-129 (1990) (arguing that the concept of fair wages in a market economy is itself gendered).

globalization enlarges the market in which men traditionally dominate. Lowering trade barriers creates wage competition among low-skilled workers in different exporting countries. Many multinational corporations find that they can compete more effectively by employing greater numbers of women and children at lower wages. Economists usually regard the impact of globalization on women as an unfortunate by-product of privatization and competition rather than the logical outcome of their own assumptions about the shape and character of a market.

One dramatic example of the impact of globalization on women is the experience of the former communist countries transitioning toward market economies. The former Soviet Union and the communist countries of Central and Eastern Europe provided a wide range of pro-natal social welfare support for young mothers, including childcare and health care. As these economies privatized state-owned enterprises and lowered trade barriers to increase competition, government programs for women were cut. At the same time, newly privatized industries cut their labor costs by laying off workers. Employers disproportionately laid off women either because many women were unable to work full-time, were presumptively not the head of household or were regarded as less productive workers. Many of these countries did not effectively prohibit gender discrimination. As a result, unemployment among women soared just as prices became inflated. As economic conditions worsened, women suffered a disparate impact. Not only were there fewer job opportunities for women, but a rise in divorce rates and emigration of men left many more women to fend for themselves without adequate government support. Poverty and prostitution among women rose to levels unknown during the communist era.³⁷²

Obviously, the economists who engineered the shift toward privatization did not intend these results, but the policies they recommended were dictated by a set of suppositions that made some social choices seem possible and not others. The necessity to shrink the public sector appeared much greater than the need to ensure that women could survive independently of men. In these ways the infrastructure changes brought about by globalization adversely affected women precisely because gender norms

372. See Francis E. Olsen, *Feminism in Central and Eastern Europe*, 106 YALE L.J. 2215 (1997)(the situation of many women in former communist countries worsened as a result of the transition to market democracy). See generally Emily Stoper and Emilia Ianeva, *Democratization and Women's Employment Policy in Post-Communist Bulgaria*, 12 CONN. J. INT'L L. 9, 20-30 (1996)(discussing the effect of privatization on Bulgarian women and citing statistics that show unemployment among women rose to 54.6 percent as of April, 1995. *Id.* at 21); Nicki Negrau, *Listening to Women's Voices: Living in Post-Communist Romania*, 12 CONN. J. INT'L L. 117, 134-140 (1996)(discussing the reason for high unemployment among women and quoting one Romanian women, "If a manager has to make a lay-off decision, he will obviously keep the most loyal and competent employees. It is clear that the employees who had other duties to fulfill outside of work are women. . .") *Id.* at 136.

were embedded in the project of globalization. If we cannot separate the fact of gender subordination from the project of globalization, then it is not meaningful to ascribe causation to gender subordination as distinct from globalization.³⁷³

E. Conclusion

There is a double irony implicit in the discourse of cultural exceptions. The language of culture originated as a language of colonization during the nineteenth century. With the end of colonization, former colonies appropriated this language to defend their national sovereignty. Today, globalization has replaced colonization as the dominant theme of inter-state relations. States participate in globalization, while seeking to preserve their cultural autonomy from global influences. As globalization breeds discontent, state actors invoke cultural exceptions. The international community rejects cultural exceptions to most international legal norms. Only the rights of women and sexual minorities are bounded by culture. Just as culture once legitimated colonization, today these cultural

373. In making this argument, I am not saying that globalization is necessarily bad for women. Globalization and the shift to market democracy often leads to greater legal protection for women against employment discrimination. These gains to women in the marketplace often are not matched by legal reforms in the private sphere. For example, as discussed above, since globalization Chile has guaranteed equal employment opportunities for women, but has resisted efforts to liberalize women's reproductive rights and access to divorce. The Chilean experience might be understood by imagining a hypothetical island country in a state of autarchy. The island has a patriarchal democracy in which women have no civil, political or social rights. Now imagine that the island opens itself up to trade with the rest of the world. For the first time, the island economy is flooded with imported goods and services, multinational investment, and foreign advertising, films, television, books and sound recordings. Further, imagine that as the rest of the world learns of the subordinate status of women on the island, foreign governments, international bodies and non-governmental organizations demand full equality for women on the island. How are the political leaders on the island likely to respond to these demands? At first the all-male legislature might object to giving women any rights, but perhaps in time the government begrudgingly grants some modest rights to women. What rights are women likely to win first? Our collective hunch would be to expect cultural resistance to any reforms, but especially to reforms involving the family. It would be as if traditional gender roles were the last refuge from foreign influence. Most likely, women would gain the right to work outside of the home before they gained other family-related rights. We would probably expect to see that the greatest resistance to gender equality would involve rights within the family, such as reproductive rights, divorce, child custody, etc. This result may seem counter-intuitive. Ceding jobs and economic independence to women may appear to threaten the economic power men enjoy. Yet, by guaranteeing equal employment opportunities for women, the law facilitates the rational allocation of labor resources and produces greater wealth for the whole economy. On the other hand, extending certain legal rights to women in the private sphere, like reproductive rights, divorce, and legal remedies to domestic violence, does not necessarily yield economic benefits. Thus, resistance to gender equality is weakest in the market and strongest in the home. This argument was first suggested to me by Professor Amy Chua.

exceptions facilitate globalization by channeling popular discontent without impeding market liberalization. The discourse of cultural exceptions serves the project of globalization at the expense of gender equality.